United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

ORIGINAL 76-1210

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

AL TAYLOR, WILLIAM TURNER, CHARLES RAMSEY, RUFUS WESLEY, HENRY SALLEY and AL GREEN,

Appellants.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

VOLUME II
Pages JA-337 through JA-564

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REFERENCES SUPPORTING BRIEF OF

RUFUS WESLEY

QUESTIONS TO BE ASKED OF PROSPECTIVE JURORS AS REQUESTED BY DEFENDANT RUFUS WESLEY

1. Has any member of your family, close friend or acquaintance ever been connected with drugs or drug addiction in any way? Alcohol?

2. Has any member of your family, close friend or acquaintance had any relationship of any kind with a law enforcement agency such as the police, F.B.I., military police, etc.?

3. Have you ever had any legal training of any kind?

4. In weighing the testimony of a witness -- any witness-- will you use your own common sense and consider whether or not there is any motive which might induce such witness to testify untruthfully rather than truthfully or to exaggerate and will you use your common sense in making such a decision?

5. Have any one of you in the course of your lives had any unpleasant experience with either an individual or group of persons different from your own racial group. -- With Blacks?

6. Have any of you ever belonged to any organization, labor union, tenants group or body of any kind which was involved in a racial dispute? If so what was the nature of the dispute? When did it take place?

7. To be asked of each juror:

1) County and place of residence, marital status

2) Have you lived any part of your life out of New York, in another country?

3) What is your educational background?

4) Where are you now employed or were employed if retired?

5) What is the nature of your occupation?

6) Does your spouse have an occupation? What is it?

7) Children? Are they employed? Where?

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for Defendant.

THE COURT: Many of you sat through another somewhat lengthy and long trial with me. You know my rules. Okay?

The rules are fairly simple.

We start at 10 o'clock in the morning. There is a 15-minute break. Lunch is at 12:30. WE start at 2 o'clock. I have another 15-minute break and we finish at 4:30.

I will tolerate absolutely no outbursts in the courtroom.

There is almost a presumption in my mind that if a defendant causes some kind of contemptuous act that his attorney might have aided and abetted in the planning of it, if I believe that to be the fact, you will get to know your client very well, because both of you will spend some time over in the Metropolitan Correctional Center.

We are going to pick a jury of 12 plus four alternates.

All challenges will be across the board.

I am not sure you may understand what I am talking about.

I am going to put 16 people in the box for openers. You can challenge anybody you want, alternate

or regular juror.

The defense, in view of the fact that we do have the four alternates, will be given four extra challenges.

The government, since you fellows are getting twice as much, will be given two extra challenges, unless somebody objects, at which point all extra challenges will be waived.

MR. FISHER: Your Honor, am I to understand that the defendants have 20 challenges, then?

THE COURT: Come on, you know the rules as well as I do as to the number of challenges.

MR.FISHER: You are saying we are getting twice as many challenges.

THE COURT: No, no, I didn't mean it that way. I meant the extra challenges, the governemnt will get two, you fellows will get four.

MR.FISHER: So we will have 16 and the government has 8?

THE COURT: That is correct.

Does anyone object to that?

MR. FISHER: Your Honor, in response to your question, who goes first in the challenges?

THE COURT: What do you mean? I am sorry.

MR. FISHER: Who exercises their challenges first, the government or the defendants?

THE COURT: We do it the same tandem operation that we always do.

MR. SCHMUKLER: It has always been tradition, as far as I recall, the government exercises their challenges first.

THE COURT: That is not correct.

MR. ENGEL: No.

MR. WEISSFELD: From my experience, your Honor, it has always been the government first.

THE COURT: Mr. Weissfeld, I am sure in State Court thatis true, but it is not true here.

MR.FISHER: So we alternate?

THE COURT: That is correct.

MR. ENGEL: Judge, may the record reflect the presence of Mr. Ramsey, who came in the courtroom several minutes ago.

THE COURT: All right. We are now missing one lawyer. Is that correct? Any lawyers --

MRS. PIEL: Excuse me, your Honor. I was trying to make inquiry as to where Mr. Wesley was.

THE COURT: Mr. Pollak just arrived. All right. Vacate the bench warrant for Mr. Pollak.

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MR. LEVNER: If your Honor please, I am going to join in with Mrs. Piel and Mr. Weissfeld with respect to the --

THE COURT: Oh, I am sorry, I forgot. Ground rules 1 I forgot to annunciate.

Any motion made by anybody applies to everybody.

MR. LEVNER: Beautiful. That covers point A. You anticipated.

Going back to B --

THE COURT: Unless, of course, it is something that is strictly personal to a particular defendant.

MR. LEVNER: I appreciate that, your Honor.

With respect to Ramsey, two overt acts mentioned, the statements are on or about February of '71.

Will the government be precluded as to any statements of January 31st or March 1st?

THE COURT: No. It says on or about. That is close enough. It is January 31st or March 1st. They will come in.

MR. LEVNER: Would the court indicate at this time possibly -- of course, without binding itself -- how far may we go back?

THE COURT: I don't know. I have to see it.

(Jury panel present.)

MR. SCHMUKLER: May I be heard at the side bar?

THE COURT: Sure.

(Side bar.)

MR. SCHMUKLER: The procedure that your Honor suggested before, I cannot agree with. I am afraid it will convey the impression to the jury that the attorneys are led by a single attorney and that their representation is more in the hands of Mr. Fisher than the individual attorneys representing them.

I have discussed it with my client and feel that I for one cannot speak for the other attorneys here. I will ask to be present if there is any discussion with any particular juror, but I think it might be just as easy even physically just as easy that if a juror is to be summoned from the box to give any explanation as to some question they have answered in a particular way, that we might just as easily perhaps use the robing room and have all the attorneys in there and there not be any risk that a juror's comment at the side bar would be overheard by potential jurors.

MR. FISHER: I must disagree with Mr. Schmukler. I think the court is trying to get as clear a picture from a juror as possible and I think it would be stultifying indeed to have that juror surrounded by a horde of lawyers.

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THE COURT: I agree with you, Mr.Fisher, and that is the reason why I am going to do it the way I said I am going to do it.

Objection noted.

MR. ENGEL: This is only with respect to hardships as to the jurors. Other particular problems will be taken up with all counsel.

MR. SCHMUKLER: It could result in the exclusion of a juror whose comments have not been heard by other counsel.

MR. FISHER: I represent that I will faithfully relate to my co-counsel whatever it is that transpired.

MR. SCHMUKLER: I am sure counsel will but I cannot delegate that authority to another attorney.

THE COURT: All right.

(In open court.)

MR. LEVNER: May I approach?

THE COURT: Yes.

(Side bar.)

MR. LEVNER: I am very unclear about Mr. Fisher's position in this case with respect to representing me or any number of attorneys here.

THE COURT: He is not representing anybody. He is handling logistics and that is all.

BY THE COURT:

Q Mr. Tomassetti, would you have problems sitting on a case of this length?

A No, sir.

Q Yes.

A (PJ 3) What is the length of this case, sir?

Q I put an outside limit of seven weeks on it.

A May I mention something to you, Judge?

Q Yes.

A I have a medical appointment six weeks from last Monday at 2:30 in the afternoon.

Q We will take care of it. Don't worry about it. That's easy.

Mr. Tomassetti, I see you come from Mamaroneck.

A (PJ 6) Right.

Q Did you live there for five years or more, sir?

A Yes, sir.

Q Are you presently employed?

A Board of Education, custodian, 17 years.

Q Are you married?

A Yes, sir.

Q Is your wife employed?

A She's a switchboard operator for the Sarah Newman Nursing Home.

Number 2, apropos, I would like him delivered to the court before that jury comes in or before at least they are seated. If the jury is brought in later, it's suspicious to a lot of them that he may be incarcerated.

MR. SIEGEL: Your Honor, if it please the Court, the situation which existed here at approximately 2 o'clock -- the respective jurors were sitting in the box and the remaining panel were sitting in the audience. Most of the defendants were here. At that time the marshals walked into the courtroom with those defendants who are incarcerated. I think that the possible prejudice to the prospective jurors in the panel may be devastating to my client.

I would ask your Honor in behalf of myself and other counsel in this case to move for a new panel because of the possible prejudice which this particular panel may have observed.

MR. FISHER: I should add in support of the respective motions, your Honor, and this may enlighten all parties, my intention is to open to the jury stating that Mr. Robinson has, in fact, been convicted for the conspiracy alleged in this case and that he does not deny, he does not deny narcotics trafficking with Mr. Dawson, Mr. March, Mr. Provitera, Mr. Pannirello and Miss Ellis.

a very nice experience with them.

I would ask the Court to inquire of the general matter about the credibility of witnesses, would the fact that a witness was a police officer or if at all narcotics agent, would that in and of itself lend greater credence to the testimony of such an individual to that juror.

Finally, your Honor, and perhaps most significantly, as I indicated in the robing room to the Court, and now I will indicate to all counsel in this case, it is my intention to disclose to the jury inopening that I will prove that Mr. Robinson, Mr. Client, is, in fact, a conspirato in the conspiracy charge and is convicted for that and is, in fact, in jail for that.

Our defense will be, your Honor, no matter what he did vis-a-vis these witnesses, he did not commit the crimes charged in this indictment.

In view of the defense that I have decided upon, your Honor, and I confirm and resolute in this opinion -- I have discussed it with my client as recently as moments ago -- I would ask the Court, and this is a very, very difficult situation, to inquire of this panel whether or not the fact that a defendant admits that he has violated the narcotics laws, will that in and of itself so prejudice him or her, the defendant making that admission, that a fair

trial will not be afforded by that jury.

MR. SCHMUKLER: In view of Mr. Fisher's stated intention, may I now move for severance in behalf of defendant Hansen. If he is going to assert a defense so thoroughly antagonistic, there is no possibility that he can receive a fair trial.

MR. WEISSFELD: I join in the move for a severance.

MR. POLLAK: I do also.

THE COURT: I assume you all join in it.

MR. GOLDBERGER: No. It's not a question -- I join, Judge. The problems are going to be individual.

My understanding of the government's case against Ernestine Barber is that it is completely intertwined only with Warren Robinson in the sense that the witnesses that saw Ernestine Barber saw her with Warren Robinson. There's absolutely no way to my understanding for us to disassociate ourselves from Warren Robinson.

Your Honor already has on file an affidavit from Warren Robinson on my original motion for a severance that Mr. Robinson would testify at a subsequent trial.

Once again I will move for a severance. On the combination of the two, your Honor, it is absolutely impossible for her to get a fair trial if Mr. Fisher is going to

your Honor, if that will expedite matters.

MR. CIAMPA: As to my client, your Honor, with respect to my motion for a severance, which I here apply to the Court, my client is only charged with conspiracy and is really not a party to some of the other counts. I would add that ground to the ground already stated by other counsel.

MRS. PIEL: Your Honor, I am not standing up to join in, although I am not separating myself out. I, of course, join in the motion to sever on the basis of prejudice. However, I want to get back to the voir dire.

I am not at all satisfied that, first of all, we know the present and past occupations of each juror. Your Honor asked thequestion generally. As it turned out, juror number 3 developed another occupation which he had a disability. I am not at all satisfied we know either their occupations or their educational background which I did request.

Secondly, your Honor, I don't believe we know anything about their children. They all appear to be rather elderly. It would seem that a number of them might have children and they might have children involved in all kinds of things that we are interested in.

I did make a written request for that.

Thirdly, your Honor, the question was asked by

nephew who had been involved in narcotics, which proves at times that jurors are a lot smarter than you think they are.

MR. SCHMUKLER: Some jurors are a lot smarter than we think they are.

MR. FISHER: That is no where near the question I am seeking to get at.

THE COURT: I understand. I will not ask your question until I decide something else.

(In open court.)

MR. FISHER: May we approach the side bar?

THE COURT: Yes.

(At the side bar.)

MR. FISHER: If your Honor please, in my capacity as lead attorney I make the following request which I do on behalf of all defense counsel. We would respectfully request the Court to inquire of the educational background of all the potential jurors. This is particularly appropriate in the case which the Court has pointed out we are dealing with at least 12 separate trials and if you break down the separate counts, the number proliferates.

For that reason alone, we think it is an appropriate question and it is something in my experience which is frequently asked by federal courts.

MR. ENGEL: No objection.

THE COURT: But I do.

MR. ENGEL: I am just saying what I think.

We would respectfully request the Court to inquire as to all occupations engaged in for any period over a year by the prospective jurors. Interestingly, for instance juror number 3, came out with a very significant kind of occupation in connection with the armed forces that we would have never known about it other than by kind of accident. Where the Court frequently asks about present employment, the Court didn't pursue previous employment.

THE COURT: Have you picked out your two challenges?

MR. FISHER: My colleagues are making that selection while I am talking to you.

Your Honor, I will be frank. I have no difficulty in expressing my opinion in excusing two of these jurors right now. I would hope your Honor would decide the question of whether or not you will inquire about prejudice to someone who candidly admits narcotic involvement before my next or our next round.

MR. SIFFERT: The marital status of number 7.

THE COURT: She is a Miss.

MR. FISHER: One final thing that is important.

UNITED STATES OF AMERICA

v. 75 CR. 1112

WARREN ROBINSON, et al.

New York, New York
January 30, 1976
10 A. M.

- - -

(In the robing room.)

MR. FISHER: Your Honor will recall that I think in the motion for a severance I told the Court quite frankly what the problem was as best as I could without confessing guilt to anything on the part of the defendant.

There is no way I can try this case in its present posture without, in my opinion, proofing or admitting to the jury that Robinson was a co-conspirator, and the very count charged here, that he dealt with the very people who were involved in this case. That is our position.

Our position will be, however, that the government will be unable to prove beyond a reasonable doubt the specific violations as charged in the substantive counts. That is the only way I can proceed, especially in view of the bifurcation.

Now, I represent to you, your Honor -- it is the guard's honest truth -- there was no orchestration of any

kind of severance applications from co-counsel. The only reason I mentioned it ahead of time was because I think I indicated on the record that other counsel were concerned about their clients coming in late and looking like they were incarcerated. I thought it appropriate them to point out that Robinson would be admitting that he's in jail.

I have spoken with other defendants counsel in this case and they are apoplectic, literatlly off the wall. I don't know what to do about that.

The government has a suggestion.

MR. ENGEL: First of all, your Honor, I think this concerns all counsel. I think we ought to have all counsel here.

THE COURT: Sure. Bring them in.

(Pause.)

THE COURT: Read it back.

(Record read.)

THE COURT: Go ahead.

MR. ENGEL: Your Honor, I would like to state the government's position on this problem.

THE COURT: Sure.

MR.ENGEL: It seems to me that there are two basic disputes involved in this case, both of which involve the same proof.

One dispute is between the government and Mr. Robinson, wherein the government alleges basically that he was the manager of much of the enterprise charged in the indictment, but there is no dispute as to him, and it's conceded, no dispute as to his participation in the conspiracy

The second dispute is with the other defendants in the case, and that dispute is whole and it involves their participation, if any, in a conspiracy charged, and deals with the proof of the existence of a conspiracy as to those defendants.

The only way to solve both these disputes in one case, it seems to me, is not to bifurcate, to sever the substantive counts as to Robinson and to try the 848 count as to Robinson with the rest of the case as to the other defendants.

The way I see that happening is that that would solve several interests.

One, it would serve the interests of the judicial economy of the court.

Two, it would solve the dispute between the government and Miss Barber as to her severance motion.

Three, it will allow Robinson not to be placed in the position of being tried on substantive counts and contesting guilt and then go to the jury, conceding guilt

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on the substantive counts if convicted in order to testify as to the 848.

Lastly, I don't think that the other defendants will be prejudiced in the event that Robinson testifies in the case on his own behalf as to the 848 because he will be there for cross-examination by all counsel.

For all I know, your Honor, his testimony will be exculpatory.

Certainly I have no notion of what his testimony will be, and his testimony will be equally subject to cross-examination between the government and defense counsel.

That is the government's suggestion as to how to try this case, one case and not several.

MR. FISHER: I can represent to you that Robinson's testimony would not be exculpatory of the co-defendants, nowhere near.

MR. SCHMUKLER: I could represent --

THE COURT: Go through it one at a time.

MR. GOLDBERGER: May I inquire of Mr. Engel how it involves my problem, your Honor?

MR. ENGEL: Because Robinson would take the stand and presumably it would be exculpatory of your client, assuming the truth of the affidavits submitted already.

MR. GOLDBERGER: What if Robinson doesn't take the

witness stand?

MR. ENGEL: Robinson will take the witness stand.

THE COURT: Would he?

MR. FISHER: On 848, yes.

MR. LEVNER: May I ask a question?

THE COURT: Sure. Let's do it one at a time.

MR. LEVNER: Have you made a decision with respect to the severance?

THE COURT: No.

MR. GOLDBERGER: I thought that's what we were talking about.

THE COURT: It's part of what we will be talking about. If I had a decision, I assure you I would come outside and tell you flat out.

MR. LEVNER: Okay.

THE COURT: Those of you who have been here before me know that.

MR. SCHMUKLER: Would your Honor be prepared to rule as a matter of law that the defendant Robinson no longer has a fifth amendment privilege with respect to this conspiracy?

MR. ENGEL: I don't think that's an issue.

THE COURT: I don't think it is either.

MR. SCHMUKLER: Then perhaps --

in count 1 of this indictment.

MR. FISHER: I understand from Mr. Engel that that article also refers to the so-called French connection case.

MR. WEISSFELD: I saw it in the papers. I was going to call your Honor's attention to it.

THE COURT: I didn't see it.

Did anyone cut it out?

MR. WEISSFELD: I cut it out. I don't know if I have it with me, your Honor.

MRS. PIEL: Your Honor, is now an appropriate time to interrupt the discussion of the newspaper article to make the point I wish to make with regard to the voir dire?

THE COURT: Yes.

MRS. PIEL: At this time I wish to repeat or to reiterate a request that before any more jurors are voir dired, that we ask all of the present persons in the box some kind of question about their educational background, how far they went in school, whether or not they had any college --

THE COURT: Mrs. Piel, I ruled on that yesterday. The ruling stands. It is not going to be changed.

MRS. PIEL: It wasn't clear to me, your Honor.

THE COURT: I ruled.

MRS. PIEL: Secondly I would like to know whether the members of the jury have children and whether --

THE COURT: I ruled on that yesterday, too.

What do you want? The ruling is no. I am not going any further. The voir dire is quite complete. There is no necessity to dig into the entire life's history to get a curriculum vitae of the people involved

you can challenge whoever you want to.

Mr. Clerk, give the board to the defense counsel.

(Recess.)

(Court's Exhibit 1 marked.)

(In open court; jury absent.)

MR. POLLAK: Before the jury comes in --

THE COURT: There are jurors in the back.

MR. POLLAK: May I approach?

THE COURT: Yes.

severance is not reversible error. There are cases that hold that denial of a severance even under those circumstances is reversible error.

I invite the Court's attention, most respectfully, to United States against Johnson, 478 F2nd 1129, which reversed where defenses were toally inequitable and inconsistent.

I need only remind the Court of Mr. Levner's statement about if Mr. Robinson were to proceed to testify there would be three, and I think the number got up to seven, more witnesses in this case. I assume he was referring to co-defendants.

Beyond that, your Honor, Mr. Robinson won't testify. The situation is if I were one of my colleagues in this case, I would be literally going through the roof looking for a spatula to scrape me off the floor in order to defend against another lawyer getting up and opening and saying that my client is guilty because that, your Honor, I regret to say, is exactly what I am going to be saying.

There is only one case that I can find, your Honor. I have discussed this with the government and their efforts have produced nothing further on this issue, but I think United States against Gambrill, 449 F2nd 1148, is as close to on point as possible.

as an officer of the court I advise your Honor of what I would submit to you, most respectfully, is a very substantial confrontation problem that would be raised by my actions in behalf of Robinson which would inure to the awful prejudice of all the other counsels' clients in this case.

The record will reflect that each of them have moved for a severance as soon as they were advised of the situation. The application, your Honor, is at this time for my request -- I renew it before exercising any further challenges to inquire of this prospective jury whether or not my admission of Mr. Robinson's culpability of a narcotics conspiracy will foreclose their fair and unbiased determination of the issues presented to it by the Court in its ultimate charge.

B2 I remind the Court as well, if I may, that in the interest of fairness to all, I have in Robinson's behalf moved for a severance if that will ease the burden I know these conflicting positions place upon the Court.

MR. SCHMUKLER: Mr. Fisher's position leaves the other defense attorneys with a prosecutor in their ranks, and I think that puts it in simplest terms.

THE COURT: Mr. Fisher, you have never been a prosecutor, have you?

A No.

Q Is there any reason whatsoever that you know of as to why you should not serve as a juror in this case?

A No, there's not.

Q Do you think you can be fair and impartial not only to each individual defendant but also to the government?

A Yes, I do.

MR. ENGEL: The jury is satisfactory to the government. The government waives its final two challenges.

MR. FISHER: The jury as presently constituted is satisfactory to the defendant, your Honor.

MR. SCHMUKLER: May I have a side bar, your Honor?

THE COURT: Sure. I tell you what. We will have a side bar which is wide open.

Ladies and gentlemen, those of you who are seated in the back, I know it's been a terribly difficult day for you just to sit there. I know after yesterday's snow and sleet and freezing rain it must be difficult for you to get in. I want you to know how deeply all of us appreciate the fact that you take that little extra effort to come here and serve as jurors. I know it must be boring to wait throught the selection of a jury, but I can't help it, nor can anybody else. That doesn't mean we don't say

accepted his conclusion that under those circumstances he didn't see how it could be a problem. The facts may be very, very compelling ones, that your Honor might find to be a problem no matter what his statement may be.

I would ask your Honor to ask that juror to disclose to the Court exactly what the facts were concerning the problem.

Absend such inquiry, I don't know how any counsel here might determine whether there is a possible challenge for cause with respect to that juror.

With respect to -- I don't recall the juror's name -- the elderly lady who recited certain members of her family were -- Mrs. Murray, who mentioned that one member of her family is serving in the Internal Revenue Service Intelligence Division and a daughter is with the Police Department -- I question when so many members of the family are so tied to law enforcement whether a juror under those circumstances could be fair at all. I would challenge that juror for cause on the basis of her answers to those questions.

B2 THE COURT: That challenge is denied.

MR. SCHMUKLER: Lastly, your Honor, at no time when counsel exercised challenges here were we of the understanding that those challenges were to be exercised with

respect to the alternate jurors as well.

THE COURT: Wait a second. Absolutely. I laid it out in nice cool language. There is no doubt about it. There are times when I'm convinced that there are only two people in the courtroom listening, me, because I have to, and the court reporter, because he gets paid to.

All right, anything else?

MR. SCHMUKLER: If I'm mistaken, so be it.

During all the time we spent in the witness room exercising our challenges, not once did any attorney raise the board for the alternates and say we have to challenge these people too. It's my understanding that we would be granted additional challenges after the main jury is sworn. The usual procedure has been to give one challenge --

THE COURT: Mr. Schmukler, I assure you you don't try and put in what the usual procedure is. The usual procedure is a lot more stringent than what you have had these past couple of days.

Anybody else?

MR. LEVNER: Your Honor, I handed up a slip of paper. It's my understanding from one of the defendants that the clerk --

THE COURT: That the clerk excused a juror for

THE COURT: Before the jury is brought in.

Hello, Mr. Asness.

MR. ASNESS: It's nice to see you.

THE COURT: I gather you are sitting in for Mr. Schmukler.

MR. ASNESS: That's correct. You didn't treat him nicely. He's not coming back.

THE COURT: Okay.

MR. ENGEL: Your Honor, in connection with that, could we just record the consent of the defendant Hansen for Mr. Asness' appearance?

THE COURT: Mr. Hansen, do you consent to Mr. Asness appearing for you?

DEFENDANT HANSEN: Yes.

THE COURT: All right.

Mr. Levner, do you have anything?

MR. LEVNER: Mr. Kelly will remain available to us as --

THE COURT: He will be. Don't worry about it.

Mrs. Piel.

MS. PIEL: Yes, I do, your Honor.

First of all, I wish to state for the record that the jury is not satisfactory to my client as represented to your Honor at the close of the proceedings.

It is my understanding that under Rule 24 of the Federal Rules of Criminal Procedure, that a defendant is entitled to peremptory challenges to be exercised either separately or jointly. I now wish to represent to the Court that in the proceedings which took place quite informally in the back room here --

THE COURT: Wait a second, not in the back room. It's the witness room.

MS. PIEL: It's in the back.

THE COURT: It might be in the back. You make it sound like it's filled with cigar smoke.

MS. PIEL: Your Honor, I meant no other description than location.

THE COURT: Go ahead.

MS. PIEL: There was one juror I wished to challenge peremptorily and I made that as clear as I could from the very beginning. There were votes, there was this, there was that. That peremptory challenge was never permitted to be exercised and the jury, accordingly, is not satisfactory to Rufus Wesley.

It is my position that constitutional due process gives Mr. Wesley the right to challenge at least one juror that he doesn't want on a panel and he did not have that opportunity.

Accordingly, I wish to bring that to your Honor's attention and to except to the statement of Mr.Fisher that the jury was satisfactory.

MR.FISHER: Your Honor, I would like to respond to that right now. I am frankly outraged at that.

THE COURT: By the way, my immediate reaction is to put you all on the stand.

MR. FISHER: I would be more than happy to take that position. I respond to this statement with veracity for openings and with a lot of other feelings as well.

I would like the record to be perfectly clear that the decisions which I reported to the Court were the decisions of the group of the lawyers, that Mrs. Piel always expressed her opinion, that she voted on each and every one of those jurors that we decided to peremptorily challenge, that she expressed her opinion, her opinion was counted, her votes were counted and that it wasn't until I think the last few minutes of our joint deliberations with regard to peremptory challenges that Mrs. Piel was unhappy about not having enough challenges for the number of people that we all wanted to challenge.

The situation was that I think there were five jurors that we wanted to challenge, there were only four

peremptory challenges left.

I point out that Mrs. Piel at no point asked that I request of the Court additional peremptory challenges or anything of the sort. The implication there was some sort of railroading in there, that Mrs. Piel or her client were denied the right to peremptory challenges, in my opinion, is ridiculous.

THE COURT: Slow down. You will never get in the record if you don't slow down.

MS. PIEL: Your Honor, my intention is not to challenge my co-counsel. I am only saying to you that in reality there was one person in particular that I on behalf of my client wished to peremptorily challenge. I am not challenging that I didn't participate in the discussion. I am not challenging that.

THE COURT: Okay.

MS. PIEL: There is one juror. I would like to challenge him now.

THE COURT: The motion is denied.

What else do you have?

MS. PIEL: All right.

THE COURT: I must say that you don't realize that there's an end to things. You better recognize it.

For example, there is an end to the challenges

MRS. PIEL: No, your Honor. No, your Honor.

that you can make on a jury. There comes a time for an end to an argument. There is an end to things.

Go ahead, Mrs. Piel. What else do you have?

MS. PIEL: I also want to point out to your Honor that with regard to the procedure of Rule 24 and the peremptory challenges to the alternates, the procedure was not followed and I believe the point was made by co-counsel.

THE COURT: The way it was set out in the record is absolutely clear. You got a better break than you were entitled to, and now to come back and attack it, it's incredible.

Do you have anything else, Mrs. Piel?

That motion is denied, too.

MS. PIEL: Yes, because the objection that I am making now underline an even more basic objection, and that is the designation of Mr. Fisher as chief counsel in this case. To represent my client before the Court, I do not think that --

THE COURT: I tell you what. Make it simple. Mr. Fisher, you are no longer lead counsel. Mr. Siegal, Mr. Goldberger --

B2 MR. GOLDBERGER: Judge, I have a peripheral defendant. I would just as soon not be lead counsel in the

case.

THE COURT: Mr. Ciampa, how about you? The only thing that we are interested in is logistics.

MR. CIAMPA: Do I get time and a half for overtime?

THE COURT: You don't get time and a half for overtime.

It's not off the record, it's on the record. You are lead counsel.

MS. PIEL: I wish to make another application, and that is whoever is lead counsel, that when there are any conferences at the bench, that at least as far as Rufus Wesley is concerned, that I can at least hear what goes on because I have already been misled once, whether it was through my own poor hearing or stupidity or whatever. I do not know what is going on unless I can hear it. Therefore, I would rather not delegate to any other person --

THE COURT: We will have no conferences at the bench. Does that make you happy? None.

MS. PIEL: Your Honor, I just wish to protect my client's rights.

THE COURT: I understand. Any objections are to be made objection period, nothing else.

MS. PIEL: Very well, your Honor. That means

THE COURT: Would you believe there are reasons such as that that would inspire people to waive the jury? To suggest it is a manipulation of the system is offensive, not only to defense counsel but also to this Court.

I understand, Mr. Engel, you are not in a position to do anything else except to reiterate the policy of your office. I am not personally offended, but I would suggest that you go back and speak to Mr. Edwards and speak to Mr. Cahill and suggest that if they don't get up a better reason for the policy, maybe they ought to drop it.

It is nothing personal.

MR. ENGEL: I understand, and there was nothing obviously personal in the government's position.

THE COURT: God save us if I was offended by everything that happened in court.

Is there a marshal present?

Mr. Fisher, you renew your motion to severe Warren Robinson?

MR. FISHER: Yes.

THE COURT: Motion is granted.

Will the marshal take Mr. Robinson out.

Mr. Fisher, I will try Mr. Robinson's case immediately after I finish this one and I tell you we are going to try it.

DEFENDANT WESLEY: Yes.

THE COURT: Yes.

MR. ENGEL: Which motion was that, just for the record?

THE COURT: The motion to sever until such time as Warren Robinson would be available to testify.

MR. MATEDERO: Also, your Honor, on the same basis that his testimony would be required.

THE COURT: Yes. I understand.

Request by the defendants to be tried to the Court without a jury; since there is no consent on the part of the government, it must be denied. If, however, at any time during this trial defendants wish to renew that request, I will entertain it.

I will also suggest the government rethink it's position and policy an awful lot.

B2 MR. SIFFERT: I would like to have the record reflect that Mrs. Piel has told me that it was Juror No.3 she wished to challenge. It was not an alternate. Therefore under Rule 24 --

THE COURT: I don't care who she wanted to challenge. This is not The Devil and Daniel Webster.

Bring in the jury.

(Jury present.)

THE COURT: Good morning ladies and gentlemen.

I give him the money and he asked me who Joe was, and I told him he was a friend of mine, that I had been up all night and I got him to drive me up there.

So he reached in the bag and give Joe some money, and told me if he's a friend of mine, he's a friend of his.

Q What happened after this?

A We returned to Washington.

Q Did anything happen on the way back?

A Yes, got stopped twice for speeding.

Q Where?

A In Jersey and Maryland.

Q What happened when you returned to Washington?

A I went home and I give Joe a little of the narcotics and he left.

Q You gave Joe narcotics?

A Yes.

Q And what did you do?

A I stayed in until the next morning and then I got in touch with Warren and Folks.

Q At this time did you have an agreement as to the price of narcotics that you would sell in Washington?

MS. PIEL: Your Honor, I object to that as asking for a conclusion. Also, I don't know who it is with or when he is talking about.

THE COURT: Hopefully we are going to find out who it is with first.

MS. PIEL: I object to it as to form and also on the grounds of asking for a conclusion.

THE COURT: Did you have an agreement with anyone?

MS. PIEL: Your Honor, I object to your question.

THE COURT: That's fine.

MS. PIEL: It asks for a conclusion.

THE COURT: I am well aware of that.

Would you like to go through the whole thing all over again?

MS. PIEL: Which thing?

THE COURT: Go through every conversation?

MS. PIEL: Sure.

MR. ENGEL: Excuse me, Judge.

Did you wish me to proceed?

THE COURT: No.

3:15, time for the afternoon break.

Mr. Clerk, escort the jury to the jury room.

(The jury leaves the courtroom.)

THE COURT: Mr. Engel, the next time the jury is leaving you had better find a seat fast.

MR. ENGEL: I'm sorry, Judge.

THE COURT: All right.

Ms. Piel, your objection is overruled.

Ms. Piel, Mr. Goldberger, Mr. Ciampa and Mr. Siegel, I want to see you in the robing room.

(Recess)

(Continued on next page)

(In open court; jury not present)

THE COURT: Ms. Piel, do you persist in your objection at this time?

MS. PIEL: I will withdraw it.

THE COURT: Bring back the jury, please.

(Jury present)

THE COURT: Bring back the witness.

THOMAS FRANK DAWSON,

resumed.

THE COURT: Mr. Engel, would you reput the last question, please.

MR. ENGEL: Yes.

DIRECT EXAMINATION CONTINUED

BY MR. ENGEL:

Q Mr. Dawson, did you have an agreement with anyone in about this period, the summer of 1971, as to what price to sell the narcotics at you received from New York?

A Yes.

Q With whom did you have that agreement?

A Warren, Folks and myself.

Q Where did you make that agreement?

A At Folks' house.

Q What was the agreement?

A As to the selling of the narcotics?

Q Yes.

A You mean as far as receiving money or what we sold it for?

Q The price you sold it for.

A We sold it for anywhere from 18 to 22 thousand dollars a kilo.

Q The narcotics that you received from Georgie, how much cut did you put on those narcotics before you sold them?

A Georgie's narcotics were very strong. We could put approximately a kilo on a kilo.

Q That is, a kilo of lactose?

A Yes.

THE COURT: Or a kilo of something else?

THE WITNESS: Yes, sir.

Q What was the something else?

A It could be mannite.

Q Returning just for a second, Mr. Dawson, to the trip you took with Joe Rains that you testified about, how much narcotics did you return to Washington with?

A Half a kilo.

Q What did you do with that half a kilo?

A I carried it home until the next morning; then got in touch with Warren and we went down to Fol..s' house

and cut it up.

Q Where was Folks living at that time?

A He was living in the Stratford Woods Apartments in Landover, Maryland.

Q What was the measure of profit that you would receive yourself out of the packages which you brought from New York and New Jersey to Washington?

A That I would receive myself?

Q Yes.

A Well, it was determined by the amount of narcotics that I sold, what we sold them for, and what everybody turned in compared to what they sold.

We had an agreement that Warren sold most of the narcotics, so he was supposed to turn in a thousand dollars more than what he paid for them. If he turned that money in, that is how we would determine.

MR. CIAMPA: May we have a date for this agreement and also an agreement as to the 18 to 22 price?

THE COURT: Yes.

Q Was this the same agreement you talked about before?

A It was.

Q That was when?

A It should have been around July of 1971, or August.

[214]

DEFENDANT SALLEY: No, sir.

MR. GOLDBERGER: Judge, amicus curiae is it accessary to exercise a bench warrant for Mr. Pollak? He is an attorney and knows his obligations. I am sure it's something that has kept him from being in court. It must be important or a personal nature or a train.

I would ask the Court to hold that off for another ten minutes or so.

MR. CIAMPA: I join in that.

MR. SCHWARTZ: I came in from Long Island. The trains are about forty minutes late this morning.

MR. MATEDERO: I had the same experience.

THE COURT: I will give him another ten minutes.

(Pause)

THE COURT: Mr. Pollak arrived. The bench warrant is vacated.

MR. POLLAK: I apologize, your Honor.

THE COURT: What happened?

MR. POLLAK: There was a lot of traffic. I was help up. It won't happen again.

THE COURT: Mrs. Piel, you have a formal application?

MS. PIEL: Yes, I do.

Your Honor, at this time I would like to move the

Court to strike the testimony of Mr. Dawson which appears in the record on Page 185 in answer to Mr. Engel's question concerning an agreement, Lines 16 through 25, Page 186, Lines 2 through 7, and then on Page 187, Lines 11 through 17, on the grounds that the witness was testifying to a conclusion and the testimony was improper.

THE COURT: I have to read it.

MS. PIEL: I think we will have to further on Page 187, your Honor, actually Lines 18 through 25, and then 188, Lines 1 through 4. It's all on the subject of the agreement.

THE COURT: I still have to read it. I haven't seen it yet.

MS. PIEL: In that same connection, I would like to withdraw my withdrawal of my objection.

THE COURT: I will see about it.

Bring in the jury.

(Jury present)

THE COURT: Good morning, ladies and gentlemen. My apologies for not being able to come in on Friday last. I assure you, I just couldn't make it.

We have going to have an abbreviated morning session because during the lunch hour we will more the entire proceedings to one of the large courtrooms. For

All right, bring in the witness.

THOMAS FRANK DAWSON resumed.

THE COURT: Mr. Witness, right beside you is a microphone. You make sure that everything you say is picked up on that mike.

All right, Mr. Engel.

MR. ENGEL: Thank you.

DIRECT EXAMINATION (continued)

BY MR. ENGEL:

Q Mr.Dawson, do you recall testifying about an agreement which you reached with Folks, Mouthpiece and Warren Robinson?

A Yes, sir.

MRS. PIEL: Your Honor, I will object on the grounds I have already stated.

THE COURT: Yes, I understand. I will let it stand.

Q How was that agreement reached, MR. Dawson?

MRS. PIEL: Objection again, your Honor.

MR. ENGEL: I am trying to cure the objection which Mrs. Piel has made. It seems a little silly to object both ways.

MRS. PIEL: Your Honor, that last question, how was it reached, was certainly an improper question.

THE COURT: Mrs. Piel, you may have a very valid techhical objection. I mentioned last week as to how it could be cured.

Would anyone here object to having it cured full route?

Do you know what I am talking about?

MRS. PIEL: No, your Honor.

THE COURT: Okay. Mr.Dawson, when was the first time you discussed narcotics with Warren Robinson?

THE WITNESS: The first time, your Honor?

THE COURT: Yes.

MRS. PIEL: I object to that as having been asked and answered.

THE COURT: Wait a second. You object, you object and you object. You want it done?

MRS. PIEL: Your Honor --

THE COURT: We will go through it the second time, the third time, the fourth time, the fifth time, etc., etc. This is not a game.

MRS. PIEL: I am quite aware of that, your Honor. Something quite important is at stake here.

THE COURT: Absolutely. I didn't put it in the record last Thursday. It is quite clear that what you want done is a reiteration of the entire thing.

MRS. PIEL: No, your Honor. No, your Honor. I object to question which have been aksed and answered being asked again.

That is another basis --

THE COURT: It is permissible to refresh the recollection of a witness by asking him was there an agreement as to price in each and every one of these conversations.

MRS. PIEL: Your Honor, I object to that question. I believe that is improper. I want the record to show it.

THE COURT: All right. Does anyone object to us going through all of the transactions?

MR. SIEGAL: I object to any reiteration of all of the testimony that has come in so far.

THE COURT: That is what we go to do.

MR. SIEGAL: I object to it.

MR. WEISSFELD: I object to it, your Honor.

THE COURT: It is one or the other.

Mr. Engel, do you want to try and shortcut it? I will permit it.

MR. ENGEL: Thank you, your Honor.

Q Mr. Dawson, the question was how did you reach that agreement?

MRS. PIEL: Your Honor has overruled my objection, is that correct?

THE COURT: Yes, I have overruled your objection.

A We discussed it between us.

Q About when was that?

A I would think some time in July of 1971.

Q Could it have been later?

A It could have been later.

MRS. PIEL: Your Honor, I object to that, to counsel leading the witness, could it have been later. The witness is answering counsel's questions.

I object to counsel suggesting another answer to the witness after he has gotten an answer.

Q Could it have been earlier, Mr.Dawson?

MRS. PIEL: Iobject to that question, your Honor.

THE COURT: Could it have been earlier or later, Mr. Dawson?

MRS. PIEL: I object to that question, your Honor.

THE COURT: Overruled, Mrs. Piel.

A Yes, sir, it could.

Q Who took part in this discussion, Mr. Dawson?

A Warren, Folks, Mouthpiece and myself.

By Direction of the
Transcript [illegible]
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UNITED STATES OF AMERICA

v.

AL TAYLOR, et al.

75 Cr. 1112

February 12, 1976
10:30 a.m.

(Trial resumed)

(In open court; jury not present)

THE COURT: How many applications do we have this morning?

MS. PIEL: Your Honor, on behalf of Rufus Wesley, he has just learned that his mother is very close to death in Virginia, and he would like to have a voluntary absence today and tomorrow and to return to court on Tuesday, if he would be able to do so.

THE COURT: Sure.

Mr. Wesley, you understand that by being absent these days, it is a voluntary absence?

DEFENDANT WESLEY: Yes.

THE COURT: You are doing it on your own, right?

DEFENDANT WESLEY: Yes.

THE COURT: You understand the consequences of it?

DEFENDANT WESLEY: Yes.

THE COURT: I hope you find her better.

DEFENDANT WESLEY: Thank you, your Honor.

THE COURT: You may leave now..

Mr. Weissfeld?

MR. WEISSFELD: The Government is stipulating with myself that Mr. Turner's name was never mentioned in any prior proceeding.

MR. ENGEL: In the prior proceeding which we have had reference to thus far.

THE COURT: What you are talking about is the Tramunti case?

MR. ENGEL: That is right, and that he was never asked about Turner.

THE COURT: Both ends?

MR. ENGEL: Right.

THE COURT: Do you agree, Mr. Weissfeld?

MR. WEISSFELD: I only agree to anything affecting my client, y[illegible] Honor.

THE COURT: You have to agree to both ends. One, his name was not mentioned in "the prior proceeding," and, two, that nobody was asked about your client.

MR. WEISSFELD: I am not aware of anything other than that.

The motion is denied.

THE COURT: All right.

MR. ENGEL: Can we have the absence by Miss Barber deemed a voluntary absence?

THE COURT: Yes.

MR. GOLDBERGER: Fine.

THE COURT: Mr. Schmukler is here. Mr. Matedero is here.

MR. GOLDBERGER: I will cover for Mr. Schwartz.

THE COURT: Mr. Green, did you hear what Mr. Goldberger said? He is covering for your lawyer right now.

DEFENDANT GREEN: Yes.

THE COURT: Is that agreeable with you, sir?

DEFENDANT GREEN: Yes.

THE COURT: We are missing one juror who has called in sick. That is what I was waiting for.

Bring in the jury.

(Jury present)

THE COURT: I am sure you gentlemen recognize that the seat generally occupied by Mrs. Oliver, Juror No. 6, is vacant. She called chambers to tell us she is sick.

Mrs. Buckley is Alternate No. 1 and will take the position of Juror No. 6.

(At the side bar)

DEFENDANT TURNER: Your Honor, I feel I am not given correct counsel and I would like to defend myself. I am presently doing ten years and I don't feel at this time I am given all the due rights of this Court and counsel.

THE COURT: I will consider it.

(In open court)

THE COURT: Bring back the jury.

(Jury present)

MS. PIEL: May I have a side bar?

THE COURT: Yes.

(At the side bar)

MS. PIEL: This is in reference to the death of the defendant Rufus Wesley's mother. He had just come back, otherwise I would have mentioned it before.

He would like to be excused until Thursday.

THE COURT: That is going to be a voluntary absence, Ms. Piel?

MR. SIFFERT: Will you concede that March can identify him?

MS. PIEL: Yes, I will, but let me tell him that.

THE COURT: Bring him here.

MS. PIEL: Mr. Wesley, I have asked the Court

if you could be excused until Thursday on a voluntary absence basis, and something has come up.

MR. SIFFERT: That is that Mr. March would identify you in court.

Will you concede that Mr. March can identify you?

MS. PIEL: In other words, will you concede that March knows who you are?

DEFENDANT WESLEY: Yes, he knows me.

THE COURT: All right.

MS. PIEL: And he may be excused?

THE COURT: Yes.

(In open court)

THE COURT: Call your next witness.

MR. SIFFERT: The Government calls James March.

J A M E S H E N R Y M A R C H,

called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SIFFERT:

Q Mr. March, will you keep your voice up and talk to the last juror in the box.

Can you state to the jury whether you have a

THE COURT: Just a thought. It is not a substantial variance.

MR. CIAMPA: What about the forum non-convenience?

THE COURT: No, we have gone too far down the path on this one.

MR. CIAMPA: Your Honor, may I just be heard on that point?

This points up a difficulty with all incidents occurring in Washington except a certain part of the conspiracy which is alleged to have occurred in New York, which is really the Tramunti case, and the case against Robinson, who is not a defendant.

All other incidents are Washington, D.C. All the witnesses at my disposal would be in Washington, D.C.

I want to point out that I was assigned a couple of days before the trial, and as far as my ability to physically investigate any of the witnesses, any of the locales, I can't test the veracity of any witness. I really can't do a job in cross-examining. He says northeast, northwest. I don't know what any place looks like. I think that is what the spirit of forum non-convenience is all about. I don't know why this case is in New York.

THE COURT: The rule is if the forum is convenient to some of the defendants, then they are all stuck with it.

MR. CIAMPA: Which defendants would it be convenient for?

MR. SCHMUKLER: Exactly two in number, Judge.

THE COURT: That might be. Two is enough.

MR. ENGEL: Three, I believe, for the record.

THE COURT: Three, all right.

MR. CIAMPA: May I hear the Government's recitation of the three defendants for whom this trial is convenient?

MR. ENGEL: Actually for all the defendants in custody on other cases. That would exclude your client. The matter is moot.

For Miss Barber and Mr. Green, as residents of the New York City metropolitan area, that is convenient for them, rather than convenient in Washington.

As I say, except for Mr. Turner, Mr. Ramsey being in custody on other cases, it would be irrelevant as to them. Until Mr. Robinson was severed on the morning of trial, it was convenient for him.

THE COURT: Okay.

MR. CIAMPA: My understanding, your Honor,

Q On the days that you did come, did you receive money?

A Yes, I did.

Q After January, 1976, have you been receiving money every day?

THE COURT: For every day, is better.

Q For every day.

A After January 6?

Q Let me withdraw it and ask you another one.

In the month of January, did you enter a witness protection program?

A Yes, I did.

MR. GOLDBERGER: Objection.

MR. POLLAK: Objection.

MR. GOLDBERGER: I have a motion.

MR. CIAMPA: Yes.

THE COURT: Stop right now.

Do you have anything more?

MR. SIFFERT: Yes, your Honor -- I will have no further questions.

THE COURT: Ladies and gentlemen, the clerk will escort you out.

Have a good lunch and keep an open mind.

(Jury leaves the courtroom.)

THE COURT: You may leave.

(Witness leaves the courtroom.)

THE COURT: Mrs. Piel?

MRS.PIEL: Your Honor, at this time I move for a mistrial.

THE COURT: On behalf of all defendants?

MRS.PIEL: On behalf of all defendants. This is not something that came out inadvertently from a witness. This was a deliberate question asked by the prosecution in order to bring to the attention of the jury this most prejudicial fact.

THE COURT: You all join in this motion. I will decide it after lunch.

(Luncheon recess.)

[1381]

THE COURT: Motion for a mistrial is denied. It seems quite apparent to me, particularly where there was testimony in the presence of the jury about others in protective custody that he knew exactly what was going on.

I will, however, suggest to theGovernment that it not be repeated.

MR. SIFFERT: Yes, your Honor.

MR. POLLAK: I have an application with respect to the minutes.

THE COURT: Is there something wrong?

MR. POLLAK: Yes.

Between pages 1284 and 1285, apparently there was a change of typist judging from the initials in the upper right-hand corner and I surmise that either one or two questions with which I started my recross of the witness March are missing and I spoke to the other stenographer and he seems to confirm that.

I would respectfully ask that a page 1284A be prepared.

THE COURT: Sure, no problem with that at all. If it is there, it is there. If you had it, it has to be in writing.

MR. SIEGEL: Your Honor, I have a small

Q How did that occur?

A It was after Paul had gone away.

Q Where did Paul go?

A He was in jail. He had been --

MR. CIAMPA: Objection.

MR. POLLAK: May we have a side bar, your Honor?

THE COURT: I don't think we need a side bar. Ladies and gentelmen, Paul DeGregorio is not on trial. Forget where he was. He just went away. Forget the rest.

Q How was it that you came to talk to Georgie after Paulie went to jail?

THE COURT: Come on. I just said no.

MR. ENGEL: I am sorry, Judge --

MRS. PIEL: I would like a side bar.

MR. POLLAK: I have a motion to make.

THE COURT: All right.

Go inside.

(In the robing room.)

MR. POLLAK: Your Honor, my motion first of all is in connection with the last objection I made and it is amplified and strengthened by what just happened.

In the first place, my last previous objection

was based upon the fact that the Government, despite repeated rulings, I know of at least two occasions or even three where the Court has instructed all counsel that the incident with Butch Pugliese, shooting Paulie, the Arrow --

THE COURT: That is why I asked the leading question to see if his knee was injured.

MR. POLLAK: Just a moment, let me finish my statement.

Despite this, Mr. Engel asks a question attempting to elicit a response. The Court attempted to cure this. I admit it is somewhat an attempt to evade your Honor's obvious ruling that has been made at least two times previously with respect to this and I submit that that is some misconduct on the part of the prosecution here.

It has no probative value whatsoever even if it were answered.

Secondly, the last question was clearly in the same category as Mr. Siffert's question about the witness protection plan. The witness answered he went away and Mr. Engel asked where did he go.

Clearly that is improper and I move for a mistrial.

MR. ENGEL: Judge --

THE COURT: Wait a second.

Mrs. Piel?

MRS. PIEL: I want to join in the motion. It seems to me what we are faced with now is no longer inadvertent statements on the part of the prosecution in the heat of battle, but it seems to me a concerted plan to see how far your Honor will go.

It seems to me that your Honor's ruling this morning that there would be no mistrial but the Government should not do whatever it was again -- now it is true the question wasn't asked today about protective custody, but it seems to me, and I am repeating in some ways what Mr. Pollak said, but I want to just add to it, that it is a concerted plan on the par tof the Government to see how far the Governme nt can go, perhaps on purpose, to get a mistrial.

I don't think any of the defense counsel want a mistrial from the point of view of we would like to carry this thing through, but we are in a position now where we have to insist on it because this conduct on the part of the Government which is now, it seems to me a course of conduct, it is not just one isolated incident, I think is unfair, absolutely.

MR. CIAMPA: I would add that I pointed out originally that the spirit of the Court's ruling in severing

By Direction of the Court
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United States of America

vs

75 Cr. 1112

Al Taylor, et al.

New York, New York.
February 25, 1976 - 10:20 A.M.

(Trial resumed.)

(In open court; jury absent.)

THE COURT: There is a motion for a mistrial made at the end of the evidence yesterday.

The motion is denied, but it is close.

The Government is hereby instructed henceforth not to go into Paulie DeGregorio's kneecap, nor the fact that certain co-conspirators ended up in jail, unless there can be shown some logical nexus between the two.

During the Tramunti case I ruled that the Government could go into this. That was because, (1), the co-conspirator thereafter found guilty who allegedly shot Paulie the Arrow in the kneecap while aiming at his head, was on trial. It was part and parcel of the entire thing.

References to jail and people going to jail

Re Smith, 7/8/72;

3553, Blackburn - SA Coward Search Warrant Affidavit Re Smith, 6/30/72;

3554, Blackburn - Report of Investigation Re Smith, 7/12/72;

3555, Parrish - Chemist Report, 6/30/72, 7/3/72;

3556, FBI Report on Fingerprints, dated 9/20/72;

3557, Report of Investigation by SA Gerald Masiello, dated 3/4/71;

3558, Report of Investigation by SA Ernest Staples, dated 6/4/71;

3559, Report of Investigation by SA Ernest Staples;

3560, Report of Investigation by Police Officer Mike land, 3/15/71.

(Recess)

(In open court; jury not present)

THE COURT: All right, Mr. Engel. You finished with the guy from Virginia?

MR. ENGEL: Yes.

My next witness is Judith Day.

THE COURT: Juror No. 7 called in a little late,

but called in. Apparently she does have some kind of a flu bug or something, so I had to excuse her.

Mr. Clerk, bring in the jury.

MR. CIAMPA: Judge, with the greatest of respect for the Court and its decision, defense counsel, I think I can say almost unanimously -- and if I am wrong, somebody will rise and correct me -- feel that this time of year with these short-term illnesses, that the complexion of the jury and all the work that has gone into selecting it on the part of the Court and the defense bar, it could conceivably be radically changed.

For that reason, the defense would unanimously urge with respect to Juror No. 7 a short adjournment. It may be that she feels better this afternoon or tomorrow morning; otherwise by the time we are into the next three or four weeks of this trial, this could continue happening. I think these things tend to snowball. This is the second juror and I just think, and the defense bar thinks, by the time we are through, the complexion of the jury will be so radically changed, we may even run out of alternates at this rate.

THE COURT: I hope and pray we don't.

I understand your motion. I even understand the unsaid words as to why you make the motion.

The motion is denied.

By the way, I received a document --

MS. PIEL: Just before you finish, that is over the objection of Rufus Wesley. We are really objecting to the substitution of an alternate.

MR. SCHMUKLER: At this time the defendant Hansen would move for a mistrial.

THE COURT: On the grounds of what?

MR. SCHMUKLER: The jury composition has been so radically altered, in the case that every defendant is black, and we are now left with three black jurors, and we selected these jurors and tried to get a racial composition with respect to the defendants on trial.

It is a punishing blow to the defense. We don't feel there would be any prejudice to the Government or any serious delay if the Court would grant the request for a one-day adjournment to see if the juror's health would return to her in time to rejoin her fellow jurors.

As I pointed out in the trial itself after the main jury was selected, that at no time during the selection of the jurors did the defense exercise any peremptory challenges in the selection of jurors. We had no idea that they would form a greater percentage of the jury.

MR. CIAMPA: One more thing: In a lengthy

trial like this, and with this large defense bar, we were in an unusual situation with respect to exercising peremptory challenges, and I think it is almost impossible for any defense lawyer to foresee a combination of circumstances in a long trial like this, with certain colds and flu is going around.

I would ask the Court to take notice of that particular fact, so we really did not exercise our options for peremptory challenges with respect to these alternate jurors, two of which will be now here in the case.

THE COURT: But you did have the opportunity. I told you from the word "go" it was across the board. It was made absolutely clear.

MR. CIAMPA: The foreseeability is what I am asking you to consider. We really couldn't foresee the length of this trial. There were estimates of four weeks, seven weeks, and I don't think the Court could, no one can, foresee the length of the trial, the weather, the condition of the upper respiratory tract of counsel, his Honor, and the jury, and besides, I don't think our clients should be prejudiced even if our lack of foreseeing was incompetence on our part. I still think the Court is charged with protecting our clients in terms of the selection of this jury. I think the composition would be changed too

MR. GOLDBERGER: The problem is, these people

radically.

MR. SCHMUKLER: May I add a brief comment? It may seem like an unusual request if the Court feels a need to discharge a jury. I want your Honor to know that it would not be the first time in this District that the Court has granted a recess to enable the jury to resume its duty.

In U.S. v. Tutino, there was a juror who was a Sabbath observer, and the Court realized that the Sabbath observer would not be able to deliberate for approximately 30 hours. Rather than discharge that juror, he delayed the deliberations and recess the trial until Saturday evening. We are not asking anything much different here. We are not asking for 30 hours; we are asking for tomorrow morning, and it is now 11:00 o'clock.

I think all we will be losing is a few hours of testimony which, if need be, we will gladly do anything possible to expedite the balance of the trial, so whatever we might lose today, we could gain at another point in time; and I think I should add, your Honor, it is not just the sense of the lawyers that we are urging upon you but the sense of our clients as well, and they are uniform in their desire to have this jury continue to serve.

(Continued on next page)

MR. CIAMPA: Even to the extent, your Honor, of making an offer at this time to work onSaturday.

THE COURT: We have a sabbath observer here too.

MR. SIEGEL: If I may be heard along the same point. What distresses me, we have a juror that claims she is sick. I would like to see some documentary evidence from a physician that she is too ill to continue sitting in this case, and unless and until we have this, I would object strongly to the juror being discharged.

THE COURT: All your motions are denied. Juror 7 is discharged.

Bring back the jury.

MR.COHEN: Before the jury comes in, I would like to note that my client is still ill, Mr. Tate, and I spoke last night to Washington, D.C. Hopefully he will be present tomorrow morning, your Honor.

MR. ENGEL: We can deem the absence voluntary?

MR. COHEN: Yes.

MR. MATEDERO: Your Honor, at this time defendant Miller wishes to renew the motion previously made that you allow her case to be tried to your Honor and not to this jury, particularly in view of the ruling that your Honor just made.

[1827]

THE COURT: Okay. I understand.

MRS. PIEL: Your Honor, before the jury comes in, there was someunfinished business with regard to defendant Rufus Wesley, and the next witness.

THE COURT: Yes. It is my belief, Mrs. Piel, both can come into evidence providing some description of the penned in portion be made.

Representation was made yesterday it was made at the same time. Just another person did the writing.

MRS.PIEL: I will make my objection now to the document coming in rather than making my objection before the jury, and I will not renew the objection when they come in, having made the record clear.

THE COURT: All right.

MR. SIEGAL, are you covering for Mr. Levner?

MR. SIEGAL: Yes.

THE COURT: Mr. Ramsey, do you object to that?

DEFENDANT RAMSEY: No.

(Jury present.)

THE COURT: Ladies and gentlemen, Miss Elaine Smith called in today. Apparently she does have the flu.

Mrs.English, take the place of Juror No. 7.

Call the next witness.

custody?

A Yes, they are, sir.

Q With respect to the document, were you served a subpoena by the United States Government?

A Yes, I was.

Q You surrendered them then to the Government?

A Yes, I did.

MR. ENGEL: I offer 52 and 53, your Honor.

I have no further questions of the witness.

THE COURT: All right. There is an objection to be noted. It is noted. They will be marked in evidence.

(Government Exhibits 52 and 53 for identification were received in evidence.)

MRS. PIEL: I have no questions, your Honor.

THE COURT: Anybody else have any questions?

All right. Step down, Madam.

(Witness excused.)

THE COURT: Call your next witness..

MR. ENGEL: Your Honor, could I pass those exhibits to the jury while I call the next witness?

THE COURT: Those two, sure.

MR. ENGEL: No, just the two there. We could pass them after we call the next witness -- maybe that would be better -- because he is very short.

DEFENDANT WESLEY: They didn't even give me

UNITED STATES OF AMERICA

v. 75 Cr. 1112

AL TAYLOR, et al.

March 8, 1976
10:30 a.m.

(Trial resumed)

(In open court; jury not present)

THE COURT: Ms. Piel, I understand you have an application?

MS. PIEL: It's a bit of a problem. My client is in the District of Columbia jail. He was coming up in court in the district at 9:15 on the return of a warrant that refers, as I understand it -- he is on parole and there was a warrant last summer -- I know he is in the jail in the sense I have called and I have ascertained he is there.

The people who called me and told me about it said they believe it is a mistake, but, in any event, he is not here.

THE COURT: Ms. Piel, would you be willing to waive on behalf of your client his presence here today? We are going to sit for half a day. We have one

juror who has got to go and have chemotherapy.

MS. PIEL: Your Honor, may I put it this way:

I believe that it is perfectly satisfactory with Mr. Wesley. Under the circumstances, I want him to do it personally when he comes back.

THE COURT: Look, we will sit for only half a day and I will get ahold of the people down in Washington to make sure he is here tomorrow.

MS. PIEL: I believe he will in person waive it, but I would like it to be done that way, since, as you know, I am Court-appointed.

THE COURT: Yes, I understand.

Do you know what court he is in?

MS. PIEL: I was told he was going to the District Court, which is at 5th Street and that he was due there at 9:15 today.

I will be hearing by 5:00 o'clock.

THE COURT: You and I are going in afterwards and we are going to make a phone call.

You are going to find out where he is, and I will talk to whoever has him, so he will be back tomorrow.

MR. MATEDERO: Your Honor, may I note for the record Miss Miller is indisposed this morning. I spoke

Is there anybody whose lawyer is missing?

Get the jury.

(Jury present)

THE COURT: Folks, I am sorry for the delay today. It is my fault again.

What happened was, I had to take care of another case and I did.

Mrs. English, Juror No. 7, has the flue.

Mrs. Moskowitz, you will be Juror No. 7. You don't have to move now.

Bring in the witness.

H A R O L D P A N N I R E L L O, resumed.

THE COURT: Mrs. Moskowitz, please, take Vitamin C.

Mr. Pannirello, you realize you have been sworn before and the oath remains.

You may continue, Mr. Schwartz.

CROSS-EXAMINATION CONTINUED

BY MR. SCHWARTZ:

Q Good morning, Mr. Pannirello.

A Good morning.

Q Mr. Pannirello, you didn't discuss this case over the weekend with anybody, did you?

A No.

UNITED STATES OF AMERICA

v. 75 Cr. 1112

AL TAYLOR, et al.

March 9, 1976
10:30 a.m.

(Trial resumed)

(In open court; jury not present)

MR. ENGEL: Your Honor, Ms. Piel informed me her client is expected to be released from the District of Columbia jail today, and I have told her, to the extent her conferences with her client when he returns make it necessary, we would provide any witness who has testified for the Government again, if she and her client think it is necessary.

THE COURT: All right, fine.

MR. WEISSFELD: If your Honor please, Mr. Turner has something he would like to address to the Court.

THE COURT: Sure. Absolutely.

DEFENDANT TURNER: Your Honor, I would like to have Mr. Dawson's grand jury testimony and Mr. March's grand jury testimony and any copies of any correspondent

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[2571]

United States of America

vs. 75 Cr. 1112

Al Taylor, et al

New York, New York.
March 10, 1976 - 10:45 A.M.

(Trial resumed.)

(In open court; jury absent.)

MRS. PIEL: Your Honor, yesterday I represented to the Court that I had heard the night before from someone in Washington, Mr. Stu Murtaugh, that Mr. -- that it had been an error that Mr.Wesley was arrested and he would be released yesterday morning.

I received a telephone call last night from a Mr. John Staggers fromWashington, D.C., who advised me that instead of being released he was transferred to Lawton as a maximum security prisoner.

THE COURT: Where is he now?

MRS. PIEL: At nine o'clock he was supposed to have been back in the courtroom to be released again today since it was an error. It has some serious overtones, your Honor.

THE COURT: Yes. Do we know who the Magistrate or the Judge is?

MRS. PIEL: I don't know who the Judge is. I don't know -- I was relying on the assurance that he would be released yesterday and that he would have a very brief absence from the court.

It seems to be quite serious now.

I don't know how to play this rather ironic comedy.

THE COURT: What you do is you leave it with me and I will call up and find out.

Do you know --

MR. ENGEL: Your Honor, I have not made efforts to help Mrs. Piel.

THE COURT: You thought he was going to get out, too.

MR. ENGEL: Yes. I volunteered to help. We were always under the misapprehension that he would appear within hours. While no proof to speak of has been adduced against him, the Government, too, would do anything it can to get him back.

THE COURT: I want to show you the benefit of a telephone.

(Pause.)

don't have to delay the trial -- if there are any defendants with their direct case that could proceed and would not object to proceeding out of order.

MRS. PIEL: Your Honor, I am not saying that I am one that wants to proceed. Whatever happens when Mr. Wesley is returned will present me with somewhat of a problem of preparation since I had hoped to be preparing our defense during these particular days that he has been absent.

MR. WEISFELD: Your Honor, Mr. Turner had made a motion yesterday in connection with certain material. Your Honor said you would think about it.

THE COURT: Yes. I am still thinking about it. Don't worry about it. I am not forgetting. I am not too smart, but I got a memory.

MR. GOLDBERGER: If your Honor please, I filed a severance motion in the beginning of this case, an application from Robinson. That was denied with leave to renew at the end of the Government's case. The Government set out a procedure they would like to follow which would include a hearing out of the presence of the jury with Warren Robinson and the Court and counsel.

I am informed by counsel for the Government that there is the possibility now that Robinson will not under any circumstances testify for me. I have not been

THE COURT: Bring in the jury.

(Jury present.)

THE COURT: We were delayed this morning, ladies and gentlemen, not because of the snow but because of a logistic problem which became a non-problem. I was glad that we planned to start at 10:30 today because my two sons had to go off to school which meant that I had to shovel thedriveway out.

Call your next witness.

MR. ENGEL: The Government calls John Nolan.

MR. SCHMUKLER: Before the witness is called, I must ask your Honor for a conference. I don't think a side bar would be suitable for it. I didn't know at this point your Honor was summoning the jury. I would have asked for it a little bit sooner. I would ask your Honor if we could to conduct this in the robing room.

T HE COURT: Sure.

(In the robing room.)

THE COURT: Okay, what's up?

MR. SCHMUCKLER: Your Honor, I am asking the Court to exclude the evidence that the Government has now offered, now offering. The Court is aware that the Government is about to offer now testimony concerning an attempt to effectuate an arrest of a defendant Hansen occurring

doesn't prove knowledge, nothing will.

This additional evidence is cumulative on that issue, and to the extent that it is resort to proof of another criminal act, it has no prupose other than to show criminal propensity.

It is also highly inflammatory to introduce that evidence in the confines of a conspiracy case where virtually no other conspirator or defendant on trial is tied or connected in any way with that evidence.

Further, in view of the fact that this defendant's conduct has not in any way been tied or connected with any other defendant on trial, save the fact that an apartment where deliveries were alleged made to him happens to be in the building where a delivery was alleged to have been made to one Al Green, apart from that, there is nothing to connect that evidence with any other defendant in this case.

As to them I think it would be highly prejudicial and has virtually no probative value. There is but one defendant against whom that defendant has any effect, and it is purely prejudicial effect without probative value, and that is the defendant Hansen.

Secondly, your Honor, the proof will not be that the defendant was found in that apartment,but

the Government intends to offer evidence and to ask the jury to infer by circumstance that he had been there.

So that what they are really being asked is to draw inference upon inference. First infer that the defendant was there; next infer, if there, these drugs were possessed by him, and, if possessed by him, they show, Number 1, his prior participation in the conspiracy, Number 2, his guilty knowledge, Number 3, association.

I submit, your Honor, that there is just no clear showing or probative value that is sufficient to outweight the enormous prejudicial flow from the introduction of these exhibits.

I also submit, Judge, that were you to exclude these exhibits, you remove, Number 1, the constitutional issue of the legality of the search and seizure.

I know that is not terribly persuasive to your Honor in view of the former ruling in the Court of Appeals. I submit to your Honor that you clearly protect the right of a fair trial to this defendant as well as to each and every other defendant.

I submit to your Honor you remove a side issue because what in effect will occur in litigating the issue of the possession of those drugs, you are asking the jury to decide a totally separate crime, a side issue

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MR. GOLDBERGER: The problem is, these people are on trial and charged with conspiracy, and the conspiracy comes through the goods which are supplied by Pannirello and Provitera and the others. If the Government can't prove that's where these goods came from, then the onus and the burden of these goods, these drugs, shouldn't fall on the rest of the defendants in this case. I believe that they will.

Even with a careful limiting instruction by the Court, I think there will be a problem. This is a case that has taken several weeks to try, your Honor. I'm sure the jury doesn't have all of the evidence clearly sifted through in their minds anyway. All they are going to know is there is drugs on the table, and all these defendants are charged in a conspiracy.

In any event, I would ask the Court to carefully instruct the jury that this only relates to Hansen, if the Court decides to limit the evidence.

MR. POLLAK: Your Honor, I join in that application, and I would also respectfully draw the Court's attention to something that Mr. Schmukler said which I think is key.

I agree with him that this is a misjoinder in that the possession of the drugs and that count is cer-

tainly not in any way connected with the conspiracy, but the jury I don't think will be able to differentiate and they would charge all the defendants with possession of those drugs, consider it a part of the conspiracy.

MS. PIEL: Your Honor --

MR. SCHMUKLER: I just want to add this:

My application is also to sever that count, your Honor.

MS. PIEL: Your Honor, I want to join in the motion as well on behalf of the defendant Rufus Wesley.

I want to add that there is a similar situation with regard to the only other narcotics that have been introduced in evidence in the case, involving the defendant Smith, where I believe the evidence is not at all that the source of the narcotics in the Smith transaction was the so-called source and, therefore, I want to tie the two issues together, because I believe they are both prejudicial to the rest of the defendants.

MR. CIAMPA: Your Honor, may I be heard very briefly?

THE COURT: Sure.

MR. CIAMPA: I wish to underscore Mr. Pollak's comment. I believe this is a misjoinder, particularly as to the defendant Taylor who is not charged with any

I am here to offer some comfort, but she is not here to give me that.

THE COURT: She is not here to let you comfort her?

MR. FELDMAN: Or the other way.

MR. WEISSFELD: If your Honor please, on behalf of the defendant Turner, he reported this morning that four jurors saw the individuals being led in in handcuffs on the third floor.

THE COURT: I know nothing about it.

MR. WEISSFELD: It happened this morning.

THE COURT: Mr. Wesley, what is the situation with you right now --

Ms. Piel, maybe you know.

MS. PIEL: I would just as soon your Honor ask Mr. Wesley. I don't really know, other than what he has told me, and it's not too clear to me.

DEFENDANT WESLEY: What happened, your HOnor, I was in Washington Saturday. I was arrested on a warrant which was a mistake, which has been straightened out. It was a mistake in the parole office, so I don't know what is happening. They transferred me to three different institutions. Every day they transferred me to another institution.

I couldn't contact nobody. I got in contact with Ms. Piel to let her know I was locked up, to tell you, and after that they kept me moving.

Last night they came and got me out of jail, maximum security in Virginia, about 9:30 and flew me up here.

I didn't see a judge or anything in any of these proceedings since Saturday.

I informed the marshals that arrested me I was due in court in New York City, that I was on trial.

THE COURT: Have you had a chance to talk with your lawyer yet as to what went on here since you have been gone?

DEFENDANT WESLEY: Have I had a chance to talk to my lawyer?

THE COURT: Or anybody.

DEFENDANT WESLEY: Yes, I talked to my lawyer.

THE COURT: What I have to do now until the Washington thing gets cleared up --

Do you have anybody in Washington at all representing you? Is there any lawyer down there representing you?

DEFENDANT WESLEY: In Washington?

THE COURT: Yes.

DEFENDANT WESLEY: They didn't even give me an attorney. I could give you some numbers to be called, what jails they had me moved around to.

THE COURT: I can't take another chance of somebody making a mistake. As for now, your bail is revoked here and you are to be considered remanded in this case.

As soon as we get this Washington thing cleared up, we can go on from there.

MS. PIEL: Your Honor, I will ask that you not revoke his bail.

THE COURT: Wait, Ms. Piel. You have to understand, I want the man here, and until the Washington thing gets cleared up, I have to do something to make sure he is here and not in Washington.

MS. PIEL: Your Honor, the Washington thing, it seems to me, is the old one. If his bail continues here, it doesn't have to be redeposited. That is why I am asking you not to revoke the bail. Let the bail stay in this proceeding and await whatever the outcome is in Washington.

THE COURT: What is the bail here?

MS. PIEL: $15,000.

THE COURT: Is it cash or surety?

DEFENDANT WESLEY: Surety.

THE COURT: And this is the one that was put up.--

(Continued on next page)

[2701]

MRS. PIEL: By the fellowship of reconciliation, and I would appreciate your not disturbing that because that may take a lot of doing to redo.

If he is on a hold in Federal custody until the matter inWashington --

DEFENDANT WESLEY: I am not a hold now. I don't have any warrants or anything.

MRS. PIEL: Your Honor has gotten him up here on some kind of proceeding.

THE COURT: I got him up on a writ, but that is a different beast. I just don't want -- until the Washington things gets cleared up, I don't want him leaving here under any circumsstances.'

MRS. PIEL: May I suggest, your Honor, if you want to hod him on the writ without bail, but leave the bail in the case on trial --

THE COURT: Fine, I will hold him on a writ without bail.

MRS. PIEL: If that is cleaned up, then I can come to you with that.

THE COURT: Once it is cleaned up, let me know and we can redo that. That is no problem at all.

MRS. PIEL: Thank you.

THE COURT: Mr. Wesley, during the period you

[2702]

were absent from the court, there was some testimony that came in, some of it, particularly yesterday, was restricted as to a completely different defendant and I told the jury not to consider any of it in connection with the conspiracy count. That had nothing to do with it and that they were not going to consider it in connection with that.

I recognize that your absence may not have been totally voluntary, but I don't think your name was mentioned -- am I wrong?

MR. ENGEL: The only mention I was able to find was at page 2407 of the transcript and 2408 where Mrs. Piel asked Mr. Pannirello some very brief questions about the time at which he first met the defendant Folk.

I recall those same questions, the thrust of those questions were asked in a hearing a week before and perhaps in Mrs. Piel's initial cross-examination, but in any event, during that period, the defendant was absent voluntarily for, I believe, an illness of some sort, he had the flu, and it was merely a rehash of that.

However, I invite Mrs. Piel's inspection of those minutes and as I have represented to the Court, we will make any witness that has been called in Mr.Wesley's absence available for further cross-examination if his discussion with his lawyer recommends that that is something

that should be done.

THE COURT: Mr.Wesley, how far did you go in school?

DEFENDANT WESLEY: I went to the twelfth grade.

THE COURT: You have no difficulty reading, do you?

DEFENDANT WESLEY: No.

THE COURT: Could we have an extra copy of those pages?

MR. ENGEL: Your Honor, I am sure Mrs. Piel has access to copies and if she doesn't, she can make copies immediately for her use.

MRS. PIEL: I have a copy and I will make it available to Mr.Wesley.

THE COURT: Let him read it.

MRS. PIEL: I don't have it with me today, however.

THE COURT: I will lend you mind and like the tie, I don't want it disappearing.

MRS. PIEL: I will give Mr.Wesley my copy.

THE COURT: Mr. Wesley, I want you to go through that. If it raises any questions whatsoever, I want you to discuss it with your lawyer and if need be, we will call back whoever was testifying at that time, okay?

is handling in Brooklyn. I discussed it with Mr. Salley and it is agreeable to him that -- and to Mr. Schwartz, that Mr.Schwartz take over for me this afternoon. Mr. Engel just advised me that as soon as the jury comes in he would like me to stay long enough to put in a stipulation which I have agreed to do.

After that, with the Court's permission, I would like to leave.

THE COURT: Sure. You can go.

All right, Mrs. Piel.

MRS. PIEL: Mr. Wesley is very disturbed. His position, as he advised me now, there is no warrant against him anywhere other than the warrant which brought him up here from Lawton last night, and he would be released were it not for the action of this Court. He has advised me that if I just -- if we speak to the marshal's office, that the marshal teletypes out -- I don't know where the marshall will teletype to, but wherever marshals teletype to, that it could be ascertained if there is no warrant outstanding against him.

THE COURT: I will take care of it during the break.

I want to get Mr. Pollak out of here. He is not going any place now, are you? You are going to

(In open court; jury absent.)

MR. SCHWARTZ: Mr. Goldberger asked me to sit in for him. He wasn't feeling very well and he asked me if I would sit in for him and Miss Barber.

MR. SIFFERT: I spoke to him in the hallway. He was looking very ill and had a headache.

MRS. PIEL: May I bring the record up to date with regard to Wesley.

THE COURT: Yes.

MRS. PIEL: I finally called a number in Washington which is apparently the parole board office. It was number 202-629-4496, and all the supervisors and the man in charge of Mr.Wesley's case had gone for the day, but she knew about the case when I mantioned his name and she said that she would check the records on it.

About five or ten minutes went by and she said she had checked them and that he had been released, that a warrant issued for him from the parole board on September 15, 1975; that he was picked up on Saturday on that warrant and that after review of it, it had been released and he had been released from prison yesterday.

THE COURT: I believe you but I went upstairs and made some phone calls, and I am expecting one back just t o make sure that there is no further warrant outstanding.

MRS. PIEL: I understand. I am giving it to you as I got it.

THE COURT: I believe you, Mrs. Piel. You don't have to worry about that. I will have an answer before 4:30.

MRS. PIEL: Thank you.

THE COURT: Bring in the jury.

(Jury present.)

THE COURT: Bring in the witness.

(Witness present.)

BY MR. SCHMUKLER:

Q Do you recall what the weather conditions were that night, that is, the morning of October 4, 1973?

A No, I don't.

Q Do you know whether it was warm or cold?

A I would say it was maybe 50 degrees. It was in October.

Q Was it cold?

A No, it wasn't chilly cold.

Q Beg pardon?

A It wasn't like a chilly cold, no.

Q The weather wouldn't have kept you from conducting a little surveillance outside the building, would it?

A No, sir.

application to the Court to specify its limiting instructions to these items of evidence going into evidence at this time, and I believe the Court's language was, "Sure, sure."

THE COURT: I have been known to say something like that.

MR. CIAMPA: I will ask that that instruction, if the Court please, be given tomorrow morning.

THE COURT: I understand. I understand exactly what you want.

Marshal, those who are in custody, keep them all here for now. Everybody else can go.

Ms. Piel, let's get on the phone --

MR. ENGEL: Is there any objection to 76, 77 and 78?

MR. SCHMUKLER: The objections are already specified.

MR. CIAMPA: I object, of course.

THE COURT: Yes.

Mark them in evidence.

(Government's Exhibits Nos. 76, 77 and 78 received in evidence.)

(Pause)

THE COURT: Mr. Wesley, I checked with the people in the marshal's office. They tell me that they have

been notified there are three open Maryland warrants. I told them to find out whether those warrants were vacated.

They are doing that. They will let me know within ten minutes.

If they have been vacated and there is no detainer on you, you will be released this evening under the same bail you were held in before, so in ten minutes it should all be cleared up.

All right, Marshal, you can bring those detained back.

(Adjournment taken to March 12, 1976 at 10:00 a.m.)

instruction at that time.

MS. PIEL: Your Honor, I will object to the photographs. I think all of the aspects of concreteness that indicate that Basil Hansen was guilty of anything here has a spillover and prejudicial effect on my client.

THE COURT: Mark them in evidence with the understanding that I am going to label Hattie Ware as Hattie Ware.

MR. SCHMUKLER: If your Honor please, your ruling admitting these is over defendant Hansen's objection.

THE COURT: Absolutely.

(Government's Exhibits Nos. 58, 61, 60, 67, 66A, 66, 65A, 65, 59, and 57 received in evidence.)

MR. ENGEL: Your Honor has given instructions to the jury as to the receipt of the evidence seized at the Hansens' apartment and, of course, it is only being received on Count 14.

I,however, would make application, as I think I did previously, that as to Government Exhibits 58 and 61, that I be permitted to argue as to their probative value on Count 1. They were both identified by the witness Pannirello and I think they should be properly considered by the jury as evidence of the conspiracy charged here.

your Honor in this case there are two propositions:

Number 1, the non-hearsay evidence does not support the charges and taken together with the hearsay evidence, certainly doesn't support the charges because there is no crime and nothing can be inferred illegally from the distribution or sale of lactose, and I most respectfully ask your Honor to dismiss this indictment, or for a judgment of acquittal.

MRS. PIEL: First I want to remind the Court it was after the stenographer had left that counsel for the Government and I were going to enter into a stipulation, and I think we consider such a stipulation entered into for purpose of this argument, that commencing in September 1972, Rufus Wesley had nothing further to do with any of the events involved in this case; that is one narrowing fact.

THE COURT: Partiuclarly in view of the fact he was in prison.

MRS. PEIL: Exactly.

Now, Mr.Wesley is charged with four overt acts in the conspiracy and two substantive counts. The only testimony in the record as to the four overt acts that in any way covers them in terms of the time and the charges is the testimony of Dawson.

The other testimony in the record which

(In open court)

THE COURT: At this time you offer 90 and 89 for identification; is that correct?

MR. ENGEL: That is correct.

THE COURT: You object to it?

MR. SIEGEL: Yes.

THE COURT: Sustained.

Do you have anything else to ask of this witness?

MR. ENGEL: No, your Honor.

MR. SIEGEL: No questions.

THE COURT: Young lady, thank you for coming up.

(Witness excused)

THE COURT: Anything else?

MR. ENGEL: There are a number of stipulations.

THE COURT: Mr. Cohen, do you have a stipulation?

MR. COHEN: Yes.

Ladies and gentlemen of the jury, the Government counsel and myself on behalf of Cecil Tate have stipulated that the indictment in the present case was returned against Cecil Tate on May 8, 1975.

MR. ENGEL: That is correct.

THE COURT: Ms. Piel?

MS. PIEL: A stipulation in which the Government

attorneys and I have entered into as far as the defendant Rufus Wesley is that from a period on or about the 1st of September, 1972, onward throughout the conspiracy, or at all times that you are concerned with in this case, defendant Rufus Wesley was not physically present in Washington, D.C., or its environs, Maryland, or anywhere nearby, and he also was not present in the Southern District of New York during that period, and you will be later told what the jurisdictional area of the Southern District of New York is.

THE COURT: I will tell you. It runs from Governors Island up to Albany County. That basically is it.

MS. PIEL: Mr. Wesley wasn't there.

THE COURT: I know, but if you want to know shorthand what the jurisdiction is, that is it.

MR. ENGEL: September 5, 1972?

MS. PIEL: Onward. That is, toward the future.

THE COURT: Any other stipulations?

MR. SCHMUKLER: Yes.

Ladies and gentlemen of the jury, Mr. Siffert, representing the Government, and myself, representing Basil Hansen, stipulate as follows:

That if the chemist who previously testified under oath was recalled, from the witness stand he would

brings me to my argument about the substantive counts which say that August, and then on September 1, 1971, Mr. Wesley possessed narcotics in the Southern Districtof New York, and I think the record is barren of any testimony of Dawson's that Wesley actually possessed narcotics, that he had possession of them himself and there is no aiding and abetting count here.

It seems to me,assuming the truth, as difficult as it is for me to assume the truth of Mr.Dawson's testimony, that a caase was not made out on substantive counts whatsoever, and that at best an extremely fuzzy case appears with regard to the overt acts, there is nothing with regard to the overt act in October and there is nothing to pinpoint anything happening on the 1st of September,as alleged in the indictment.

Finally, I want to renew my motion to strike the testimony which I believe appears in the record around pages 185, 187, something like that, 183, I made the motion at the time, that Dawson testified he had an agreement to deal in narcotics with Robinson and with Wesley.

It seems to me, if that remains in the record, it seems to me that is reversible error, that a witness would be permitted to testify to such a conclusion and if that is knocked out, it appears to me from a factual

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UNITED STATES OF AMERICA

v. 75 Cr. 1112

AL TAYLOR, et al.

March 16, 1976
10:15 a.m.

(Trial resumed)

(In open court; jury not present)

MR. MATEDERO: If your Honor please, there is one point that I neglected to mention in my argument on the motion yesterday. Just an oversight.

With respect to Overt Count 17, it was charged that in or about November 1971 my client had delivered certain sums of money to Warren Robinson in paper bags.

There is a variance with the proof because the testimony by March was that this happened in February or early 1973, so there is a discrepancy of two to three months and, for that reason, among others, I would urge that Overt Count 17 be stricken, the evidence with respect to that be stricken.

MS. PIEL: Your Honor, there were several things I neglected to state in my presentation yesterday. One of them had to do with the lack of evidence as to Overt Act No. 14, having to do with an incident taking

place in October of 1971, but the more important matter which I neglected to bring to the Court's attention was that the defendant Wesley renews his motion to strike all of the testimony concerning co-conspirators which do not involve the defendant Wesley and which are prejudicial to Mr. Wesley's case.

I understood the evidence was admitted subject to connection and it is now the defendant Wesley's contention that at least as to the following witnesses there was no connection: Al Taylor, William Turner, Bryant Ferguson, James March, Charles Ramsey, Dorethea Ann Ellis, Walter John Smith, Cecil Tate, Henry Salley, Ernestine Barber, Basil Hansen, Al Green, Arhelia Miller and Mr. Sweeney.

THE COURT: On the motion to strike, the motion is denied.

MR. SCHWARTZ: Judge, I want to point out Al Green is not here. He called in and he is home sick. I would deem it a voluntary absence.

THE COURT: Did you try to get him?

MR. SCHWARTZ: I didn't have a chance to call him, but he called in, and Richard, the court reporter, spoke to him.

MR. MATEDERO: Your Honor, it was 1972, and the

MR. GOLDBERGER: I think I do have a right to offer what was read to the jury.

Let me talk to Mr.Engel and see if we can agree.

THE COURT: Mrs. Piel, with your client, does he want to recall anybody?

Has he gone through all of the transcript?

MRS. PIEL: Your Honor, I made it available to him from time to time. I am afraid I can't speak for him with regard to his position.

DEFENDANT WESLEY: Your Honor, I went back to Washington and I consulted some lawyers and truthfully I don't know if my rights have been violated or not. So I am in a position I don't waive it at this point.

THE COURT: You are not waiving what?

DEFENDANT WESLEY: If I am in tune about what you are saying about waiving the three days --

THE COURT: I just want to know if you want them called back and have them go through the same testimony again.

DEFENDANT WESLEY: I don't know. I really don't understand.

THE COURT: Why don't you talk to your lawyer about it, okay,.

by the name of Salley, are in fact references to the

THE COURT: I heard you, but you will not get it that way.

Mrs. Piel, I was reminded of the fact you had some additional requests. Meany of them will be given in my language, but you can consider all of them denied and you have an exception to that.

Defendant Smith, are you on bail?

MR. SIEGAL: Personal bond.

THE COURT: The personal bond is vacated.

Defendant Smith is remanded.

Marshal, I want you to know that defendant Smith is remanded.

Mr. Ciampa, do you have any application?

MR.CIAMPA: Your Honor, I realize you said any motions to strike overt acts that were not granted were deemed denied. However, I did make motion to strike certain testimony as being at variance with Overt Acts 2 and 34 in the indictment.

THE COURT: I am sorry, Mr. Ciampa, I should have picked that out, but I didn't. That is denied also.

MR. SIEGEL: No application.

THE COURT: Mr. Levner?

MR. LEVNER: None at all.

MR. SIEGAL: No application.

Selected Requests to Instruct Offered by Defendant Wesley

(Through page JA-448)

REQUEST NO. 4

Testimony shown to be given at a previous trial or legal proceeding which is inconsistent with testimony given at this trial may be considered by you on the issues of the truth of that testimony as well as on the issue of impeachment. You are the sole judges of the truth of the testimony you have heard.

Adapted from U.S. v. Klein 488 F.2d 481 (2 Cir. 1973)

REQUEST NO. 6

You will recall that all the witnesses who testified in this case against the defendant Rufus Wesley have been convicted of serious crimes and have made certain agreements with the government. They also have been promised by the government that they will not be prosecuted for their own actions in connection with their agreement to testify against the defendants here. Some such as Tennessee Dawson and James March have been promised that their cooperation with the government, that is, the testimony they have given against these defendants will be made known to the Court prior to their being sentenced for crimes of which they have been convicted. Harry Pannirello's cooperation and promise to continue to give testimony has already been considered in a sentence of probation by another Federal District Court for the same or similar crimes about which he has testified in this case. Because such inducements have been made to these witnesses, you must examine the testimony of each with great care, because the testimony of any or all of them may be affected by the person's own personal interest.

Adapted from Devitt and Blackmar, Volume 1, §12.02
Hoffa v. United States, 385 U.S. 293 (1966)
United States v. Gonzalez-Carta, 419 F.2d 548, 551, (2 Cir. 1969);
Lemons v. United States, 339 F.2d 761 (9th Cir. 1964).

REQUEST NO. 7

The testimony of an informer, or a co-defendant, or an alleged co-conspirator who provides evidence for personal advantage in his own treatment by the prosecution, the Probation Officer, or the Court must be received with caution and weighed by the jury with great care. The jury should carefully examine whether such evidence has been affected by that witness's own interests, or by prejudice against the defendant.

Devitt and Blackmar §12.02 Testimony of Informer -- Interested Witness [modified].

REQUEST NO. 8

You are here to determine the guilt or innocence of those defendants here on trial based upon the evidence in the case. You are not called upon to determine the guilt or innocence of any other person or persons. Even though you may believe one or more other persons are also guilty, you may not find any of the defendants on trial guilty unless the evidence in the case so convinces you beyond a reasonable doubt. Unless you are so convinced it is your duty under the law to find that defendant or defendants not guilty.

Devitt and Blackmar §17.01 Verdict as to Accused Only [modified].

that, of course, has to be stricken. I don't think that

I also want to add, before the trial began,

REQUEST NO. 9

In order to sustain a verdict of guilty as to Count One, the Government mus introduce evidence that there was a single conspiracy as charged in that count. In essence, Count One charges all defendants with the same conspiracy deal in unlawful narcotics.

The defendant Wesley contends that, if you believe the Government witnesses and accept the Government's theory of the facts, at least two conspiracies have in fact been proved. The first is a conspiracy among Paul Gregario, Dawson and Robinson to deal in narcotics. A second conspiracy is one among Ellis and others to deal in cocaine. A third conspiracy involves Basil Hansen and Hattie Ware; a fourth conspiracy defendant Smith and others.

If you find that there were in fact multiple conspiracies as above outlined, rather than the single conspiracy charged, then you must acquit the defendant Wesley and all other defendants on Count One.

Kotteakos v. United States, 328 U.S. 750 (1946); and see, United States v. Calabro, 467 F.2d 973 (2d Cir. 1972), cert. denied 410 U.S. 926 (1973), and cases cited therein at p. 983. U.S. v. Finkelstein F.2d , Docket Nos. 75-1154, 75-1155, 75-1170, 75-1171, Decided December 1, 1975.

REQUEST NO. 11

As I have previously instructed you, there is a significant difference between the conspiracy charge and the substantive charges. And that difference is that in order to convict on the substantive counts, you must find, beyond a reasonable doubt, more than an agreement to violate the law. Unless you find that defendant Wesley actually distributed or possessed with intent to distribute a narcotic substance in the amount of one half kilogran of Heroin in or around New York (The Southern District of New York) some time in August and/or on September 1, 1971, you must acquit on counts 4 and 5.

REQUEST NO. 12

As to the witnesses who have admitted lying to the grand jury or otherwise in the past you should consider their testimony and decide whether you wish to accept or reject it in whole or in part. You may decide, for example, that an admitted liar is unbelievable, or, conversely, you may accept his testimony recognizing that in life there are persons who have lied in the past but are not incapable of telling the truth in the present. Again, this is for you and only you to decide.

United States v. Projansky, 465 F.2d 123, 136 (2 Cir. 1972).

REQUEST NO. 14

A witness may be discredited or impeached by evidence that the general reputation of the witness for truth and veracity is bad in the community where the witness now resides, or has recently resided.

If you believe any witness has been impeached and thus descredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

One witness for the prosecution has testified that he had a well known reputation as a safecracker and that he had, in that capacity terrorized the Washington, D.C. and Maryland communities. You may consider the witness's own self-styled characterization in determining whether or not such a reputation would reflect on his reputation for truth and veracity.

Adapted from Devitt and Blackmar §12.07.

REQUEST NO. 19

The testimony of an admitted perjurer should always be considered with caution and weighed with great care.

Devitt and Blackmar §12.03

REFERENCES SUPPORTING BRIEF OF HENRY SALLEY

THE COURT: At this time the Government is going to call whom?

MR. ENGEL: The Government will call Harry Pannirello.

THE COURT: You have an application?

MR. BROWN: Yes.

THE COURT: I will take the application in the robing room.

(In the robing room)

MR. BROWN: Judge, in connection with the application I have to make at this time with respect to the testimony of the witness Harry Pannirello vis-a-vis the defendant Henry Salley, it might be appropriate to inquire of Mr. Engel what it is that he intends to prove, an offer of proof with respect to the witness Pannirello in connection with Henry Salley.

The reason I bring this up is that unless something miraculous has occurred between the date Pannirello testified in the prior trial and today, unless something dramatic is changed, I assume Mr. Pannirello will be unable to identify Henry Salley as the person whose acts and statements he is allegedly describing during the course of his direct testimony.

MR. ENGEL: I assume so.

MR. BROWN: If that is the case, I think the defendant Henry Salley would be sorely and severely prejudiced if the jury is permitted to infer that the conduct and the statements that Pannirello will describe are in fact the acts and the statements of the defendant, my client, on trial. That would be an impermissible inference, it seems to me, and one that can be guarded against in court if the Court would be willing to make a limiting instruction to the jury that the testimony against Henry Salley is neither admissible nor binding against the defendant on trial.

MR. ENGEL: The only testimony that I believe will be adduced against Henry Salley, from my knowledge of the witness and having been present, along with several counsel and your Honor at the last trial, is that on one occasion he was at the Howard Johnson's waiting for Warren Robinson who he knew as Alan, and at that time Mr. Salley approached him in his car, identified himself as a person named Salley, and then continued to say that Warren would be up, or Alan would be up, and so forth.

That is the only testimony that will be adduced.

I assume that Mr. Pannirello will fail to identify Mr. Salley as he did the last time.

Mr. Provitera testifies to the identical

incident and at the last trial did identify Mr. Salley.

Even were he to fail to do so at this trial, Mr. Provitera, that is, the testimony would still be admissible and binding against Salley, but the jury -- any argument could be made as to its weight in the light of the failure to identify.

I further note that the Government intends to offer, as it did in rebuttal last time, an exhibit which the Government will argue places Henry Salley at the motel, the Howard Johnson's, at the time that Provitera and Pannirella testify he was there.

All fo these matters are circumstantial evidence and, of course, previous identifications of Salley as an associate of Robinson all create overwhelming circumstantial evidence to show that the man here described is in fact Henry Salley.

MR. BROWN: The difficulty I have with Mr. Engel's response, it does not address itself at all to the problem that I foresee if, in fact, the jury is permitted to consider Pannirello's testimony while he is testifying as some evidence against the defendant Henry Salley on trial.

It seems to me the jury is obliged to infer that the reference, the testimonial references to a person

by the name of Salley, are in fact references to the defendant on trial, where, in fact and in truth, and this could be a matter of stipulation, this witness, Harry Pannirello, does not have personal knowledge, nor does he have a present recollection that my client, the defendant on trial, did or said anything of an incriminating nature. Therefore, his verbal references to a person who identified himself, according to Pannirello, as Salley, it seems to me would be extremely prejudicial.

In other words, what I am saying is, this witness is not possessed of the personal knowledge that would render him a competent -- and I underline "competent" -- witness against the defendant Henry Salley.

THE COURT: This is not going to come in before lunch?

MR. ENGEL: It is at the end of his testimony.

THE COURT: Let me read my notebooks and the testimony.

MR. SCHMUKLER: I anticipate a problem with respect to the testimony to be adduced against my client.

There was a seizure -- your Honor was aware of having made some rulings in connection with it during the Tramunti trial -- that took place at an apartment at 150 West 225th Street, when the Government agents attempted

representation from the Government in open court as to whether or not any of the three witnesses, namely, March, Dawson, or Ellis, were shown any photographs between the time they allegedly saw and spoke with my client and this in-court testimony.

MR. ENGEL: I don't know, Judge.

MR. CIAMPA: That's in the testimony, your Honor. That is in the minutes, that they were shown photographs between the time --

MR. LEVNER: He just cured the statement. He said there was no affidavit. There was an affidavit.

THE COURT: All right.

MR. BROWN: I think there is a somewhat separate question that arises in connection with the case of Henry Salley, and I think this has some bearing on the application which I made prior to the noon recess, which I anticipate your Honor will rule upon before Mr. Pannirello is sworn to testify.

THE COURT: He has already started. He has been sowrn and he started already.

MR. BROWN: I'm sorry; before he continues.

In any event, I think the application should be amended to include, I think, an instruction to Mr. Engel, and this is really not a Wade motion but it is a directive,

it seems to me, that ought properly be issued by the Court to Mr. Engel that he should not be inquiring of Mr. Pannirello to attempt an identification of Henry Salley.

The reason that he should not be permitted even to ask that question, it seems to me, in the case of Henry Salley -- we have law in this case, that law being from the Court of Appeals -- the Court of Appeals parenthetically remarked that the photographic identification procedure that was followed with respect to Henry Salley both by the witness Provitera and Pannirello was, indeed, impermissibly suggestive.

My recollection from the record is that you ruled in the case of Mr. Provitera that Mr. Provitera had had a sufficient opportunity, independently of that suggestive photographic showup, to make an in-court identification.

You did not rule that way with respect to the defendant Pannirello because he did not make an identification of the defendant Henry Salley. He was asked that question on the trial. He looked, I assume, at each of the defendants in the courtroom. Mr. Henry Salley was present in the courtroom. Mr. Pannirello looked around and testified under oath, after looking at Mr. Henry Salley, that Mr. Henry Salley was not present in court.

It seems to me that where that witness has

already testified under oath having had an opportunity to look at Mr. Salley, he's testified that Mr. Salley was not in the courtroom, when you have from the Court of Appeals that dicta that Salley was the victim of an impermissibly suggestive photographic identification procedure, then it seems to me that we are doing something that is pretty, pretty unfair, and pretty, pretty risky, leaving it to Mr. Pannirello perhaps to take a wild guess, a wild hunch, and point the finger today, nearly two years later.

It seems to me if he did, by mischance or otherwise, identify Henry Salley at this trial, a timely motion to strike that testimony would be granted for the reason, for the reason that you would not be able to hold that his in-court identification was untainted by what has happened in this case up until now with respect to the defendant Salley.

I don't apprehend that some miracle has occurred and Mr. Pannirello is going to be able to make that identification. I don't believe that he will.

I really don't think that he should even be given that opportunity, because then a timely motion to strike, even though granted, will not cure the prejudice that will result in terms of the jury having heard testimony

that, of course, has to be stricken. I don't think that Mr. Engel should be permitted to give him another try at nailing Mr. Salley.

THE COURT: A strange choice of words.

MR. SCHWARTZ: Your Honor, aside from what I said, I wonder if the Government would be willing to indicate now that Mr. Pannirello has not pointed out the names of various individuals and where they are sitting in the courtroom for the purposes of identification.

MR. ENGEL: As a result of the motions, I asked the witness at lunch in my office whether -- I said:

"Answer the following questions yes or no."

I asked him whether he saw the defendants, and the witness answered.

I said, "Do you see where they were sitting?"

He told me. He answered that question.

That's all I asked. That's all I asked him. That's all he told me.

I wanted to know whether in-court identifications would be made; that's all. I didn't indicate in any fashion --

(Continued on next page)

I also want to add, before the trial began, I asked Mr. Engel to furnish me with this very same information. He resisted it then. He resisited it early in the trial, and he resisted up until last week when your Honor finally prevailed on him that he make the disclosure which caused me to make the motions which I made today, which I intend to formalize in papers.

MR. ENGEL: The material he requested was 3500 material.

THE COURT: I was there. Everybody apparently doesn't seem to want to believe the fact that I was there.

Let me sort them out.

(Recess)

(In open court; jury not present)

THE COURT: Mr. Ciampa, your motion to strike is denied.

Mr. Brown, you made a motion that the Court direct the United States Attorney not to have your client attempt to be identified by this particular witness since he failed to identify him before.

I have no recollection of the wording which you referred to in the Court of Appeals' opinion.

MR. BROWN: I have a copy of it here, Judge.

(Continued on next page)

THE COURT: I will read it. However, as for a direction, your motion for a direction that there be no attempted identification as of now is granted.

Mr. Schmukler, your motion to suppress at this time is grossly untimely.

Mr.Schwartz, Mr.Schmukler and Mrs. Piel,your application for a Wade hearing will be granted.

I assume, Mr. Engel, that you want to see if you can find these 50 photographs, so under the circumstances --if you can't, you can't, but give it a true. Under the circumstances, we will adjourn from now until 9:30 tomorrow morning.

The jury is going to be instructed to return here at 10:30 tomorrow morning, after which, hopefully, we will be in a position to get the rest of this trial finished.

MR. ENGEL: Judge, I have a request of the Court and that is that the jury be brought in, put in the box and have it explained to them that there is a legal problem --

THE COURT: If you want it done that way, fine.

MR. ENGEL: I would appreciate it.

MR. CIAMPA: Before the jury comes in --

MR. LEVNER: You didn't rule on my motion.

THE COURT: What was your motion? I might

care of that tomorrow. It is only half a day.

MR. BROWN: It is a disability check. It came in on the 1st.

MR. ENGEL: Does he have it here?

MR. BROWN: It is at his home in Washington. It is a disability check that came in on the 1st. If he doesn't cash it, he will not have the means to pay his rent.

MR. ENGEL: I believe other arrangements can be made.

THE COURT: No, he will be here tomorrow.

MR. BROWN: Judge, I have an application.

THE COURT: Other than this?

MR. BROWN: Other than the one that has been made.

Before I take my leave in this case, I made an application on Tuesday before the noon recess with respect to Mr. Pannirello's testimony in connection with the defendant Henry Salley, and some things have occurred in this case that I think make it necessary to review that application, but perhaps to state the grounds therefor and more particular grounds than I did earlier: What I am essentially asking for, and this is in view of your ruling, in effect precluding Mr. Pannirello from making or

attempting to make an in-court identification of the defendant.

The prejudice I think I alluded to earlier was what to me at least would be the inescapable inference that the jury will draw in this case that Mr. Pannirello's testimonial references to a person by the name of Salley, they will assume or will infer that those references are to the defendant Henry Salley on trial here.

Now, I think that that inference that they are likely to make could be offset to some degree, or could be neutralized if your Honor would instruct the jury prior to Mr. Pannirello's making any references to a person by the name of Salley, if you would instruct them that Mr. Pannirello will not identify Henry Salley, a defendant on trial here, as the person to whom he refers in his direct testimony; therefore, you may not on the basis of his testimony assume or infer that he is the same person.

I think an instruction of that character and of that kind would, as I say, have a desirable and what I think is a very necessary effect. Otherwise, the evidentiary significance of your ruling that Mr. Pannirello may not attempt an in-court identification I think will be wholly lost on the jury, and in effect what that would

mean, it is equivalent to an in-court identification to suppress. That would in effect be a more serious injury to the defendant than if it was to be denied.

I think that instruction would be perfectly proper and if this were not a conspiracy case, I would be asking for a much stronger instruction, and that would be to the effect that none of Mr. Pannirello's testimony should be admissible or considered as binding upon the defendant.

That is the instruction I asked for earlier, and I am amending it now to make it more precisely fit the stated facts of this case.

(Continued on next page)

MR. ENGEL: Your Honor, the Government's position is that Mr.Salley's identification, according to your Honor's view of the fairness of the case as it stands, that his identification should be suppressed.

The Government takes exception to your Honor's ruling, but nevertheless I understand it.

The point of the matter is, Mr. Pannirello's testimony one way or theother is circumstantially corroborated by every other witness as has appeared here with regard to the fact that the person he refers to as Salley, the jury may infer is the defendant on trial and as to the specific incident that Pannirello testified to, that is specifically corroborated by the witness Provitera, as it was at the last trial and by the registration card at the Howard Johnson's motel, which we intend to produce.

THE COURT: Your application is denied, Mr. Brown.

MR. BROWN: If I may for just one moment, I don't want to belabor this too long. I know it is a difficult trial.

I think Mr. Pollak who is now going to reassume his responsibility in this case, is going to face how best to deal with this issue in the presence of the jury, and I think if you hold to your ruling in this matter, it

[2115]

perhaps might oblige Mr. Pollak to put Mr. Pannirello on the stand as his own witness in order to get before the jury the fact, and it is a fact that on the last and prior proceeding, that Mr. Pannirello was unable under oath of personal recollection and personal knowledge to testify that Mr.Salley on trial is the same person he had some dealings with on Route 46 at the Howard Johnson's restaurant in March of 1972.

In effect, he might be obliged to make him his own witness only in order to impeach him on the basis of his previous sworn testimony.

I think that is an untenable position to be put in particularly in view of the fact that the purpose behind the motion to suppress the in-court identification is to insure that the jury does not consider that which is not evidence against a defendant on trial.

Now the jury will not have any reason except to assume that Mr. Pannirello's references to a person by the name of Salley are, on the basis of his testimony, they will assume those references are to the defendant in trial, but it is not the case, it is not the fact and it is not the truth.

THE COURT: My ruling stands.

Anybody else?

TRANSCRIPT OF SENTENCE HEARING

OF DEFENDANT SALLEY

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

-vs- : 75 Cr. 1112

AL TAYLOR, HENRY SALLEY, AL GREEN, :

Defendants. :

May 14, 1976
11:00 a.m.

BEFORE:

HON. KEVIN THOMAS DUFFY,

District Judge

APPEARANCES:

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
BY: THOMAS E. ENGEL, ESQ.
Assistant United States Attorney

HENRY POLLAK, ESQ.
Attorney for Defendant Salley

MR. POLLAK: Defendant ready, your Honor.

THE COURT: Mr. Engel, do you have anything to say?

MR. ENGEL: No, your Honor, I do not.

THE COURT: Mr. Pollak, do you?

MR. POLLAK: Yes.

Your Honor is of course a little familiar with Henry Salley by this point having had him before the Court for two rather extended trials.

I have, in accordance with your Honor's request, reviewed the probation report which, as I view it, is sort of an updating of the probation report that was rendered two years ago.

Basically, I think that Henry Salley's role in this thing was that of a rather minor character. He was not in any way dealing independently in drugs. The only evidence against him was on the basis of the fact that he was sort of an errand boy making pick ups and deliveries for Robinson.

I think that, viewed in the context of the man's whole life, his military record, which was outstanding, a decorated veteran of the Korean war, the fact that he was steadily employed after that with the -- it was the railroad down in Washington, D.C., until he retired on disability

pension. Then after that he was getting two disability pensions.

Really he was getting partial from the Government based on his military service and a more substantial one from his employment.

Unfortunately, Mr. Salley, whose education was limited, had a lot of time on his hands and I guess he saw a chance to make some easy money.

As your Honor knows, Mr. Salley was convicted two years ago in the Tramunti case and was sentenced to five years. Because of what amounted to a technicality, the Court of Appeals saw fit to vacate that conviction and he was retried in this case.

In the meantime, of course, he had started serving his sentence and he served. I think the probation report is in error, they said 12 and a half months. I think they were timing it since the date of sentence. In actuality he was remanded at the time of the verdict so he served 14 months.

During the course of his imprisonment, I believe it was in Lewisburg, he didn't sulk, he became a chef. He engaged in some useful activity. His attitude was good there, I understand. Since he is out, when he was released on bail, despite his disability and his various ailments,

he found employment, and the probation report bears that out.

He has been employed steadily since that, shortly after he was released on bail in 1975.

If the Court would impose the same sentence that the probation department seems to recommend at this time -- although originally they had said some incarceration seems indicated, but this time they said, "Well, he should get the same sentence he got last time -- if it did, and the Probation Department also said that, he would be eligible for a parole in six months.

The Government -- I read Mr. Engel's rather fine summary of the different roles of these people -- and the Government, while it terms a lot of the defendants in this case major narcotics dealers,-they certainly don't term Mr. Salley that. I think that no one really could.

Mr. Salley is just an unfortunate person who got mixed up in this thing at the wrong time.

If you view this thing as to what the appropriate disposition should be with regard to Mr. Salley at this time, you have to view several things. First of all, imposing the original sentence and again interrupting his life when he is now trying to reconstruct it would in reality be a much more severe sentence than the original sentence because it

would involve disrupting his life twice. If we look at the rationale of any kind of criminal sentence, I think all of that would come out in Mr. Salley's favor. I think to send him to prison again certainly wouldn't help him rehabilitate himself as he has already done. I think it would certainly hurt.

I don't think Mr. Salley can be deemed to be a danger to the community. I think that any narcotics contacts that he had are certainly broken at this time. Certainly he has no inclination. I am certain that he has done nothing from the time he has been on bail over a year that would indicate that he intends to return to this. I don't think that, because of the unusual circumstances here, to send him back to prison would also not act as a deterrent to others.

I would respectfully, strongly urge this Court that it consider exercising the function of the Parole Board in effect and to suspend the balance of any sentence that it imposes with regard to Mr. Salley. I think that keeping him on probation for a period of time, I think, would certainly assure everyone that he will continue to be a law abiding citizen. This abberation in his life which occurred as a result of his participation in this conspiracy will be terminated. Thank you.

MR. ENGEL: Your Honor, if I may make just one comment. Under North Carolina versus Pierce, your Honor, as I read the law, may not impose any sentence greater than the one imposed in the first case.

THE COURT: Unless facts are brought to my attention which I did not know about the first time.

MR. ENGEL: Right, except that -- it is a close question, your Honor, as to whether those facts have to dea with a period after sentence was imposed the first time. A I read that decision recently it seemed to me that that's the way it looked, given Justice White's concurrence.

In any event, your Honor, Mr. Salley's involvement in this conspiracy was just dabbed at in the Tramunti case where the proof came only from Provitera and Pannirell and your Honor has now a much fuller picture of Mr. Salley' extensive involvement in narcotics.

THE COURT: Mr. Salley, do you wish to be heard

THE DEFENDANT: I have nothing to say, sir.

THE COURT: After reviewing today again in my mind the extent of the involvement which was testified to b you in this entire dirty business, I was tempted to impose the full 15 years. Then I thought about the fact that you had been out for a year and apparently you have kept yourse clean. You better do it for the rest of your life. Fair i

fair.

The judgement of this Court is that the defendant, Henry Salley, will be remanded to the custody of the Attorney General for a period of five years; all prior time, whether prior to sentence or after sentence, will be deducted from the sentence that includes today, so as to permit him consideration at the earliest time. The special parole period of three years will be added to that. Just make sure that you stay clean..

THE DEFENDANT: Yes, sir.

THE COURT: Do you have a motion, Mr. Pollak?

At this time, do you request continuation of the bail status pending appeal?

MR. POLLAK: Yes, your Honor.

MR. ENGEL: The Government moves to remand.

THE COURT: Mr. Pollak's motion is granted.

Mr. Salley, I forgot to mention the fact that you have the right to appeal. If you want me to, I will direct the clerk to file a notice of appeal.

MR. POLLAK: Mr. Salley has indicated to me that he does want to appeal. We respectfully ask that such an order be filed.

THE COURT: It will be done.

MR. POLLAK: Thank you, your Honor.

(Adjourned.)

REFERENCES SUPPORTING BRIEF OF

AL GREEN

(including Indictment in Tramunti Case)

GOVERNMENT'S BILL OF PARTICULARS

TEE:slc
75-1668
M-1369

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -x

UNITED STATES OF AMERICA :

- v - : GOVERNMENT'S BILL OF PARTICULARS

WARREN ROBINSON, et al., : S 75 Cr. 1112(KTD)

Defendants. :

- -x

S I R S :

The United States of America, as and for its Bill of Particulars, alleges as follows:

1. COUNT ONE

Overt Act 1:	Occurred in Warren's Men's Shop, 3312 Georgia Avenue, N.W., Washington, D.C. in the evening hours.
Overt Act 2:	Occurred in the mid-evening hours on the street. Purpose was to discuss payment for narcotics previously supplied by Robinson.
Overt Act 3:	Occurred during the afternoon and evening on a plane, in a car, and in a house located at or near the specified intersection. Paul DiGregorio, a/k/a "Paulie the Arrow" traveled with the defendant Ellis.
Overt Act 4:	Occurred in the early evening hours in an apartment occupied by the defendant Sweeney at the location specified. Heroin was supplied by Warren Robinson.
Overt Act 5:	Occurred in the evening in the vicinity of Co-op City, Bronx, New York.

Overt Act 6:	Occurred in the afternoon hours on the premises of Roger's Surgical Supply Co., Inc. Lactose was delivered to Warren Robinson.
Overt Act 7:	Occurred in the late afternoon hours in the apartment of the defendant Wesley in Landover, Maryland.
Overt Act 8:	Occurred in the early evening hours in the vicinity of the New England Thruway (Interstate 95). Heroin was received from Frank Pugliese, a/k/a "Butch", a/k/a "George".
Overt Act 9:	Occurred during the late afternoon and early evening between the place specified in Overt Act 8 and the place specified in Overt Act 7. Thomas Dawson, a/k/a "Tennesee" accompanied the defendant Wesley.
Overt Act 10:	Occurred in the early afternoon in a car parked in the vicinity of a supply house for the People's Drug Store. Lactose was delivered to Warren Robinson.
Overt Act 11:	Occurred in the evening hours. Purpose was to discuss using defendant LaSalata as a "stash" for heroin.
Overt Act 12:	Occurred in the daytime hours in a hotel room. Heroin was given by Warren Robinson.
Overt Act 13:	Occurred in the daytime hours. Travel ended in the McAlpin Hotel. Purpose was to assist in heroin transaction part of which is described in Overt Act 12.
Overt Act 14:	Occurred in the afternoon hours between a Howard Johnson's Motor Inn on Route 46, and the apartment of the defendant Wesley in Landover, Maryland.

Overt Act 15:	Occurred in the morning hours on the tenth floor of the Twin Towers apartment building complex in Silver Spring, Maryland.
Overt Act 16:	Occurred on the street in the vicinity of Merry and Zulette Avenues, Bronx, New York. Heroin was delivered to John Barnaba.
Overt Act 17:	Occurred at various times in the same location as that alleged as to Overt Act 15. Amounts of money are unknown.
Overt Act 18:	Occurred in the evening hours in Apartment 7-D. Heroin was delivered by Harry Pannirello.
Overt Act 19:	Occurred in the area adjacent to the Eastern Airlines Terminal, La Guardia Airport in the late afternoon or early evening hours. Warren Robinson held physical possession of the heroin.
Overt Act 20:	Occurred in the early afternoon hours in an apartment in the 4700 block of Third Place, Northwest. Ferguson had previously given the heroin to Tate who gave it to Thomas Dawson, a/k/a "Tennessee" at the specified time and place.
Overt Act 21:	Occurred in the early evening hours in a building in the 4700 block.
Overt Act 22:	Occurred in the apartment of the defendant Barber on the second floor of the building at the specified address in the early hours. Purpose of the meeting was to arrange for the sale of narcotics.
Overt Act 23:	Occurred in a hotel in Manhattan in the mid-evening hours.
Overt Act 24:	Occurred in the late afternoon hours in the vicinity of 1733 Jesup Avenue. Gift was in part compensation for defendant Barber's assistance in sale of heroin.

Overt Act 25:	Occurred in the daytime. Trip was made in an automobile.
Overt Act 26:	Occurred at a time unknown. Amount of heroin unknown.
Overt Act 27:	Occurred at a time unknown. Amount of heroin unknown.
Overt Act 28:	Occurred in an automobile stopped in the specified vicinity in the evening hours. Heroin was delivered by James Provitera.
Overt Act 29:	Occurred on the same premises alleged in Overt Act 6 in the afternoon hours. Lactose was delivered to Warren Robinson.
Overt Act 30:	Occurred in the daytime on the same premises alleged in Overt Acts 6 and 29. Heroin was received from, and Lactose was given to, Warren Robinson.
Overt Act 31:	Occurred in a 1967 Chevrolet truck license plate #C11927, parked in front of 370 Georgia Avenue in the afternoon hours. Drugs were given to a person named Goldberg.
Overt Act 32:	Occurred in the daytime hours in the vicinity of 16th Street and Columbia Road. Heroin was given to John Doe, a/k/a "Alvin".
Overt Act 33:	Occurred in the early evening hours.
Overt Act 34:	Occurred between nine and eleven p.m.
Overt Act 35:	Occurred in the evening hours at the Howard Johnson Motor Lodge, Ridgefield Park, New Jersey. Purpose was to purchase one-half of kilogram of heroin.
Overt Act 36:	Occurred on several occasions in both the daytime and night time hours with various individuals.

2. COUNT TWO

The names of those individuals the Government will rely on to establish that Robinson was manager and supervisor of a continuing criminal enterprise are as follows:

Bryant Ferguson,
James March,
Cecil Tate.
Henry Salley,
Walter John Smith,
Arhelia Miller,
Ernestine Barber,
Ronald Sweeney,
Al Taylor,
William Turner,
Charles Ramsey,
Dorethea Ann Ellis,
Rufus Wesley,
John Doe, a/k/a "Ronald",
John Doe, a/k/a "Donald",
Fred Ginyard, and
Samuel James, a/k/a "Piggy"
Thomas Farmer,
George Hunter,
John Doe, a/k/a "Earl"

3. COUNT THREE

Same allegations as those with respect to Overt Act 3.

COUNT FOUR

Same allegations as those with respect to Overt Act 8.

COUNT FIVE

Same allegations as those with respect to Overt Act 9.

COUNT SIX

Same allegations as those with respect to Overt Acts 12 and 13.

COUNT SEVEN

Same allegations as those with respect to Overt Act 16.

COUNT EIGHT

Same allegations as those with respect to Overt Act 18.

COUNT NINE

Same allegations as those with respect to Overt Act 19.

COUNT TEN

Same allegations as those with respect to Overt Act 23.

COUNT ELEVEN

Same allegations as those with respect to Overt Act 25.

COUNT TWELVE

Same allegations as those with respect to Overt Act 27.

COUNT THIRTEEN

Same allegations as those with respect to Overt Act 28.

John Doe, a/k/a "Chan,"
Jane Doe, a/k/a "Conchita,"
Jerry Serrentino,
Louis Oliveras,
Jack Spada
John Doe, a/k/a "Ralph Birdie",
John Doe, a/k/a "Bubba",
Martin DeSaverio, a/k/a "Jinx",
Marion Starace,

John Dugan
Joseph Andretta
Harry Pannirello
John Pannirello
James Provitera,
John Doe, a/k/a "Frankie",
Buddy Drake
John Doe, a/k/a "Gus," a/k/a "Gigi,"
James Kelly,
Fred Ginyard,
"Dump" Payne,
John Doe, a/k/a "Cristobal",
John Doe, a/k/a "Alvin",
Freddie Scott,
John Doe, a/k/a "Ronald",
John Doe, a/k/a "Donald",
John Doe, a/k/a "Mouthpiece",
Alfonso Jackson,
John Doe, a/k/a "Chester",
John Doe, a/k/a "Ken",
John Doe, a/k/a "Cooper",
Thomas Farmer,
George Hunter,
John Doe, a/k/a "Libby,"
John Doe, a/k/a "Earl,"
Wilbur V. Ward, a/k/a "Billy Bumps"
Michael Tucker,
John Doe, a/k/a "Black Sammy",
William Hightower,
Sidney David Foster, a/k/a "Chinch",
Samuel James, a/k/a "Piggy", and
Cornelius Anton Garner, a/k/a "Moochie",

Yours, etc.,

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Southern District of New York
Attorney for the United States
of America

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Counsel for Defendant Basil Hansen

INDICTMENT U.S. v. TRAMUNTI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

:

-v-

CARMINE TRAMUNTI, : INDICTMENT
LOUIS INGLESE, a/k/a "Gigi", a/k/a "The Whale",
JOSEPH DELVECCHIO, a/k/a "Joe Crow", S73 Cr. 93/
DONATO CHRISTIANO, a/k/a "Finnegan", :
THOMAS LENTINI, a/k/a "Moe",
ANGELO MAMONE, a/k/a "Butch",
JOSEPH DINAPOLI, :
CARMINE PUGLIESE,
FRANK PUGLIESE, a/k/a "Butch",
PAT DILACIO, :
ANTHONY LORIA,
JACK SPADA,
VINCENT RIZZO, :
JOHN BARNABA,
DOMINICK LESSA,
GEORGE TOUTOIAN :
FRANK PELLEGRINO, a/k/a "Swifty",
JOSEPH MARCHESE, a/k/a "Joe Cab",
RICHARD FOBRICK, :
FRANCIS RUSSO,
WARREN C. ROBINSON, a/k/a "Alan",
THOMAS DAWSON, a/k/a "Tennessee", :
AL GREEN,
BUTCH WARE,
HATTIE WARE, :
JOHN SPRINGER, a/k/a "Hank",
MARY JANE SALVIANI, a/k/a "Liz",
HENRY SALLEY, a/k/a "Sally", :
JOHN DOE, a/k/a "Folk",
JOHN DOE, a/k/a "Basil",
JOHN DOE, a/k/a "Joe Red", :
JOHN DOE, a/k/a "Jimmy Wyatt Earp", and
JOHN DOE, a/k/a "Sinatra",

:

Defendants.

---------- -X

The Grand Jury charges:

1. From on or about the 1st day of January, 1969, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York,

CARMINE TRAMUNTI,
LOUIS INGLESE, a/k/a "Gigi", a/k/a "The Whale",
JOSEPH DELVECCHIO, a/k/a "Joe Crow",
DONATO CHRISTIANO, a/k/a "Finnegan",
THOMAS LENTINI, a/k/a "Moe",
ANGELO MAMONE, a/k/a "Butch",
JOSEPH DINAPOLI,
[illegible] PUGLIESE,
[illegible] PUGLIESE, a/k/a "Butch",
PAT DIBACIO,
ANTHONY LORIA,
JACK SPADA,
VINCENT RIZZO,
JOHN BARNABA,
DOMINICK LESSA,
GEORGE TOUTOLAN,
FRANK PELLEGRINO, a/k/a "Swifty",
JOSEPH MARCHESE, a/k/a "Joe Cab",
RICHARD FOBRICK,
FRANCIS RUSSO,
WARREN C. ROBINSON, a/k/a "Alan",
THOMAS DAWSON, a/k/a "Tennessee",
AL GREEN,
BUTCH WARE,
HATTIE WARE,
JOHN SPRINGER, a/k/a "Hank",
MARY JANE SALVIANI, a/k/a "Liz",
HENRY SALLEY, a/k/a "Sally",
JOHN DOE, a/k/a "Folk",
JOHN DOE, a/k/a "Basil",
JOHN DOE, a/k/a "Joe Red",
JOHN DOE, a/k/a "Jimmy Wyatt Earp", and
JOHN DOE, a/k/a "Sinatra",

the defendants, and Louis Oliveras and Primrose Cadman, named herein as co-conspirators and not as defendants, and others to the

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Grand Jury known and unknown, unlawfully, wilfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 4705(a) and 7237(b) of Title 26, United States Code, and Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would sell, barter, exchange and give away narcotic drugs, the exact amount thereof being to the Grand Jury unknown, not in pursuance of a written order of the person or persons to whom such narcotic drugs were sold, bartered, exchanged and given away on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, contrary to law, in violation of Sections 4705(a) and 7237(b) of Title 26, United States Code.

3. It was further part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed

in the Southern District of New York and elsewhere:

1. In or about June, 1969, defendants LOUIS INGLESE and JOSEPH DELVECCHIO went to Diane's Bar, 2032 Second Avenue, New York, New York.

2. In or about June, 1969, defendant JOSEPH DELVECCHIO handed co-conspirator Primrose Cadman an aluminum-foil packet containing heroin in Diane's Bar, 2032 Second Avenue, New York, New York.

3. In or about November, 1969, defendant LOUIS INGLESE transported a clear plastic bag containing heroin to Diane's Bar, 2032 Second Avenue, New York, New York.

4. In or about June, 1970, defendant ANTHONY LORIA delivered one-half kilogram of heroin.

5. In or about September, 1970, defendant RICHARD FOBRICK received one-quarter kilogram of heroin.

6. In or about May, 1971, defendants JOSEPH DELVECCHIO and DONATO CHRISTIANO went to Bloomfield, New Jersey and "cut" and packaged three kilograms of heroin.

7. In or about May or June, 1971, defendants THOMAS LENTINI and JOHN DOE, a/k/a "Joe Red", met in the vicinity of a barber shop on Pleasant Avenue, New York, New York.

8. In or about July, 1971, defendants FRANK FUGLIESE, PAT DILACIO and JOHN BARNABA met in the vicinity of Westchester Avenue and Buhre Avenue, Bronx, New York.

9. In or about December, 1971, defendant JOSEPH DINAPOLI delivered a package of heroin.

In or about November, 1971, defendants THOMAS DAWSON, a/k/a "Tennessee", and JOHN DOE, a/k/a "Folk" travelled from Washington, D.C. to New Jersey.

11. In or about November or December, 1971, defendant JOHN SPRINGER, a/k/a "Hank", received a quantity of heroin.

12. In or about January, 1972, defendant CARMINE PUGLIESE delivered approximately three kilograms of heroin.

13. In or about January, 1972, defendant JOHN DOE, a/k/a "Sinatra", received approximately three kilograms of heroin.

14. In or about March, 1972, defendants AL GREEN, BUTCH WARE, HATTIE WARE and JOHN DOE, a/k/a "Basil", received a quantity of heroin.

15. In or about October, 1972, defendant JOSEPH DELVECCHIO went to Robbie's Mardi Gras, 731 Seventh Avenue, New York, New York.

16. In or about October, 1972, defendants WARREN C. ROBINSON, a/k/a "Alan", and HENRY SALLEY, a/k/a "Sally", travelled from Washington, D.C. to New Jersey.

17. In or about May or June, 1971, defendant JOSEPH MARCHESE, a/k/a "Joe Cab", received one-half kilogram of heroin from defendant LOUIS INCLESE at the Beach Rose Social Club, Bronx, New York.

18. In or about November, 1972, defendant GEORGE TOUTOIAN delivered a quantity of heroin.

19. On or about January 10, 1973, defendant FRANCIS RUSSO received a quantity of heroin.

20. In or about January, 1973, defendants CARMINE TRAMUNTI and LOUIS INGLESE had a conversation at Lo Piccolo, 3044 Westchester Avenue, Bronx, New York.

21. In or about April, 1973, defendant MARY JANE SALVIANI, a/k/a "Liz", received a quantity of mannita.

22. In or about May, 1973, JOHN DOE, a/k/a "Jimmy Wyatt Earp", went to the Golden Hour, 2233 Boston Road, Bronx, New York.

23. In or about May, 1973, defendant JACK SPADA received approximately one-half kilogram of cocaine.

24. On or about May 30, 1973, defendant VINCENT RIZZO went to the Centaur Restaurant, 342 East 46th Street, New York, New York.

25. On or about May 30, 1973, defendant THOMAS LEMTINI, a/k/a "Moe", delivered a quantity of cocaine to defendant DOMINICK LESSA.

(Title 26, United States Code, Section 7237(b) and Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

From on or about the 1st day of May, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, LOUIS INGLESE, a/k/a "Gigi", a/k/a "The Whale", the defendant, unlawfully, wilfully, intentionally and knowingly did engage in a continuing criminal enterprise in that he unlawfully, wilfully, intentionally and knowingly did

violate Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A) as alleged in Counts Eleven, Twelve and Fifteen of this indictment which are incorporated by reference herein, which violations were part of a continuing series of violations of said statutes undertaken by the defendant in concert with at least five other persons with respect to whom the defendant occupied a position of organizer, supervisor and manager and from which continuing series of violations the defendant obtained substantial income and resources.

(Title 21, United States Code, Section 848.)

COUNT THREE

The Grand Jury further charges:

In or about the month of June, 1969, in the Southern District of New York, LOUIS INGLESE, a/k/a "Gigi", a/k/a "The Whale", and JOSEPH DELVECCHIO, a/k/a "Joe Crow", the defendants, unlawfully, wilfully and knowingly did sell, barter, exchange and give away to Primrose Cadman approximately 30 "bags" of heroin, a narcotic drug, in that the said sale, barter, exchange and giving away was not in pursuance of a written order of the said Primrose Cadman on a form issued in blank for that purpose by the Secretary of the Treasury of the United States or his delegate.

(Title 26, United States Code, Sections 4705(a) and 7237(b).)

COUNT FOUR

The Grand Jury further charges:

In or about the month of June, 1969, in the Southern District of New York, LOUIS INGLESE, a/k/a "Gigi", a/k/a "The Whale", and JOSEPH DELVECCHIO, a/k/a "Joe Crow", the defendants, unlawfully, wilfully and knowingly did sell, barter, exchange and give away to Primrose Cadman approximately one-half ounce of heroin, a narcotic drug, in that the said sale, barter, exchange and giving away was not in pursuance of a written order of the said Primrose Cadman on a form issued in blank for that purpose by the Secretary of the Treasury of the United States or his delegate.

(Title 26, United States Code, Sections 4705(a) and 7237(b).)

COUNT FIVE

The Grand Jury further charges:

In or about the month of November, 1969, in the Southern District of New York, LOUIS INGLESE, a/k/a "Gigi", a/k/a "The Whale", the defendant, unlawfully, wilfully and knowingly did sell, barter, exchange and give away to Louis Oliveras approximately one ounce of heroin, a narcotic drug, in that the said sale, barter, exchange and giving away was not in pursuance of a written order of the said Louis Oliveras on a form issued in blank for that purpose by the Secretary of the Treasury of the United States or his delegate.

(Title 26, United States Code, Sections 4705(a) and 7237(b).)

COUNT SIX

The Grand Jury further charges:

In or about the month of November, 1969, in the Southern District of New York, LOUIS INGLESE, a/k/a "Gigi", a/k/a "The Whale", the defendant, unlawfully, wilfully and knowingly did sell, barter, exchange and give away to Louis Oliveras approximately one ounce of heroin, a narcotic drug, in that the said sale, barter, exchange and giving away was not in pursuance of a written order of the said Louis Oliveras on a form issued in blank for that purpose by the Secretary of the Treasury of the United States or his delegate.

(Title 26, United States Code, Sections 4705(a) and 7237(b).)

COUNT SEVEN

The Grand Jury further charges:

In or about the month of June, 1970, in the Southern District of New York, ANTHONY LORIA and JOHN BARBARA, the defendants, unlawfully, wilfully and knowingly did sell, barter, exchange and give away to RICHARD FOBRICK approximately one-half kilogram of heroin, a narcotic drug, in that the said sale, barter, exchange and giving away was not in pursuance of a written order of the said RICHARD FOBRICK on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate.

(Title 26, United States Code, Sections 4705(a) and 7237(b); Title 18, United States Code, Section 2.)

COUNT EIGHT

The Grand Jury further charges:

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tofore, what is your decision?

In or about the month of November, 1971, in the Southern District of New York, FRANK FUGLIESE, a/k/a "Butch", PAT DILACIO and JOHN BARNABA, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-half kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT NINE

The Grand Jury further charges:

In or about the month of December, 1971, in the Southern District of New York, JOSEPH DINAPOLI and PAT DILACIO, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT TEN

The Grand Jury further charges:

In or about the month of January, 1972, in the Southern District of New York, CARMINE FUGLIESE and PAT DILACIO, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately three kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

Southern District of New York, GEORGE TOUTOIAN and VINCENT RIZZO, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-quarter kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT FOURTEEN

The Grand Jury further charges:

On or about the 10th day of January, 1973, in the Southern District of New York, FRANCIS RUSSO, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-quarter kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT FIFTEEN

The Grand Jury further charges:

In or about the month of May, 1973, in the Southern District of New York, CARMINE TRAMUNTI, LOUIS INGLESE, a/k/a "Gigi", a/k/a "The Whale", JOSEPH DELVECCHIO, a/k/a "Joe Crow", and JOHN DOE, a/k/a "Joe Red", the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately three kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT SIXTEEN

The Grand Jury further charges:

In or about the month of May, 1973, in the Southern District of New York, LOUIS INGLESE, a/k/a "Gigi", a/k/a "The Whale", THOMAS LENTINI, a/k/a "Moe", and JACK SPADA, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one-half kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT SEVENTEEN

The Grand Jury further charges:

On or about the 30th day of May, 1973, in the Southern District of New York, THOMAS LENTINI, a/k/a "Moe", and DOMINICK LENSA, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one-eighth of a kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

FOREMAN

PAUL J. CURRAN
United States Attorney

GOVERNMENT'S BILL OF PARTICULARS
U.S. v. TRAMUNTI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
- v -	:	GOVERNMENT'S BILL OF PARTICULARS
CARMINE TRAMUNTI, et al.,	:	73 Cr. 1099
Defendants.	:	

S I R S :

The United States of America, as and for its Bill of Particulars, heretofore consented to by the Government (see letter of December 10, 1973), alleges as follows:

1. COUNT ONE

Overt Act 1 - Early evening hours in the summer or fall of 1969. Amount of heroin was 1/2 ounce.

Overt Act 2 - Early evening hours of the latter part of August, 1970 at 1464 East 233rd Street, Bronx, New York. Amount of cocaine was 1/4 kilogram received from John Barnaba and no money exchanged.

Overt Act 3 - Evening hours in the beginning of October, 1970 at Pilgrim Avenue and Westchester Avenue. Bronx, New York. Money was paid by Lessa to John Barnaba for 1/2 kilogram of heroin previously delivered by Lessa to Barnaba.

Overt Act 4 - In the evening hours of November, 1970 at Wilkenson Avenue near Hutchinson River Parkway, Bronx, New York. The heroin was

Overt Act 5 - In the evening hours of November, 1970 at the Beach Rose Social Club, 3203 Westchester Avenue, Bronx, New York. Purpose was to assist Louis Inglese in counting the proceeds of a narcotics transaction.

Overt Act 6 - In the evening hours of May, 1971 at 17 Daka Court, Bloomfield, New Jersey.

Overt Act 7 - In the afternoon in May or June, 1971 on the sidewalk at 320 Pleasant Avenue, New York, New York. Purpose of the meeting was for Thomas Lentini to instruct Frank Stasi that Joseph Ceriale would supply mannita with which to cut heroin.

Overt Act 8 - In the evening hours in mid-May, 1971 at Izzie's Luncheonette, 3000 Buhre Avenue, Bronx, New York. Purpose of the meeting was to discuss with John Barnaba sales of narcotics to Barnaba.

Overt Act 9 - In the evening hours in the middle to end of May, 1971 in a parking lot at Bruckner Boulevard and East Tremont Avenue, Bronx,

New York. Money was paid in exchange for 1/8 kilogram of heroin given to Russo earlier that evening by Barnaba.

Overt Act 10 - In the evening hours of May or June, 1971 at Beach Rose Social Club, 3203 Westchester Avenue, Bronx, New York; no money exchanged.

Overt Act 11 - In the evening hours of January, 1972 at 1462 Rosedale Avenue, Bronx, New York; no money exchanged.

Overt Act 12 - In the evening hours in March, 1972 at 1380 University Avenue, Bronx, New York. Approximately 1/2 kilogram of heroin was delivered in exchange for $14,000.

Overt Act 13 - In the evening hours of early to mid-October, 1972. Purpose was to transfer 6 kilograms of heroin from Del Vecchio's car to Frank Stasi's car.

Overt Act 14 - In the evening hours of mid-October, 1972 at the Howard Johnson Motor Lodge, Ridgefield, New Jersey. Purpose was to purchase 1/2 kilogram of heroin.

Overt Act 15 - Approximately 2:00 P.M. on January 14 or 15, 1973. Purpose was for Inglese to obtain money from Tramunti to purchase heroin.

Overt Act 16 - In the evening hours. Purpose was to purchase cocaine from Frank Stasi.

Overt Act 17 - In the evening hours at the Pleasant Avenue Bar, 117th Street and Pleasant Avenue, New York, New York. Amount of cocaine was 1/8 kilogram and no money was exchanged.

2. COUNT TWO

The names of those individuals the Government will rely on to establish that Inglese was manager and supervisor of a continuing criminal enterprise:

Joseph DelVecchio
Donato Christiano
Thomas Lentini
Angelo Mamone
Joseph Ceriale
Frank Stasi
John Barnaba
Frank Pellegrino
Jack Spada
Joseph Marchese
John Doe, a/k/a "Jimmy Wyatt Earp"

3. COUNT THREE

In the early evening hours of June, 1969 at Diane's Bar, 2032 Second Avenue, New York, New York. The amount was 15 bags of heroin which was given to Primrose Cadman in exchange for women's clothes.

COUNT FOUR

In the early evening hours of July, 1969 at Diane's Bar, 2032 Second Avenue, New York, New York. The 1/2 ounce of heroin was given to Primrose Cadman in exchange for women's clothes.

COUNT FIVE

In the evening hours of November, 1969 at Diane's

Bar, 2032 Second Avenue, New York, New York. The one ounce of heroin was given to Primrose Cadman in exchange for women's clothes.

COUNT SIX

In the early evening hours of November, 1969 at Diane's Bar, 2032 Second Avenue, New York, New York. One ounce of heroin was given to Primrose Cadman in exchange for women's clothes.

COUNT SEVEN

In the evening hours of the latter part of August, 1970 at 1464 East 233rd Street, Bronx, New York. The 1/4 kilogram of cocaine was given to Tolopka by John Barnaba.

COUNT EIGHT

In the afternoon of mid-September, 1970 at the Beach Rose Social Club, 3203 Westchester Avenue, Bronx, New York. The 1/4 kilogram of heroin was given to John Barnaba for $5500.

COUNT NINE

In the evening hours of October, 1970 at 4151 Boston Post Road, Bronx, New York. The 1/2 kilogram of heroin was transported from Queens by Lessa and John Barnaba.

COUNT TEN

In the evening hours toward the end of October, 1970 at 4151 Boston Post Road, Bronx, New York. The 5/8

kilogram of cocaine was transported by Lessa and Barnaba from Queens.

COUNT ELEVEN

In the evening hours at the beginning of November, 1970 at the Beach Rose Social Club, 3203 Westchester Avenue, Bronx, New York. Barnaba received the 1/4 kilogram of heroin in exchange for $5500.

COUNT TWELVE

In the evening hours of the month of November, 1970 at the Beach Rose Social Club, 3203 Westchester Avenue, Bronx, New York. Barnaba received the 1/4 kilogram of heroin in exchange for $6000 or $6500.

COUNT THIRTEEN

In the evening hours toward the end of November, 1970 at 1462 Dwight Place, Bronx, New York. Barnaba received the 1/4 kilogram of heroin in exchange for $5000.

COUNT FOURTEEN

In the afternoon toward the end of February, 1971 at the Beach Rose Social Club, 3203 Westchester Avenue, Bronx, New York. Barnaba received the one ounce of heroin for $2000.

COUNT SIXTEEN

In the evening hours of mid-May, 1971 on the New England Thruway near Phillips Avenue, Bronx, New York. The 1/8 kilo of heroin was delivered by John Barnaba to Frank Russo, who paid $3000 at a later time.

COUNT SEVENTEEN

In the evening hours of May or June, 1971 at the Beach Rose Social Club, 3203 Westchester Avenue, Bronx, New York. Marchese received 1/2 kilogram of heroin from Louis Inglese, and no money was exchanged at that time to the Government's knowledge.

COUNT EIGHTEEN

In the evening hours of mid-September, 1971 at Pelham Parkway near Eastchester Road, Bronx, New York. The 1/2 kilogram of heroin was delivered by Pat DiLacio to John Barnaba in exchange for $6000.

COUNT NINETEEN

In the evening hours of the first week of November, 1971 at 3139 New England Thruway. The 1/8 kilogram of heroin was delivered by John Barnaba in exchange for $3500.

COUNT TWENTY

In the evening hours toward the end of September, 1971 at Hutchinson River Parkway near Hudson River Apartments, Bronx, New York. The 1/8 kilogram of heroin was delivered to John Barnaba, and no money was exchanged.

COUNT TWENTY-ONE

In the evening hours of mid-December, 1971 in the Bronx, New York. One kilogram of heroin was transferred by Joseph DiNapoli to Pat DiLacio in exchange for $22,000.

COUNT TWENTY-THREE

In the evening hours of July, 1972 at 1113

Vincent Avenue, Bronx, New York. Between 2 and 3 kilograms of heroin were cut and packaged at this time.

COUNT TWENTY-FOUR

In the evening hours of early to mid-October, 1972 at 1113 Vincent Avenue, Bronx, New York. Three kilograms of heroin were cut and packaged at this time.

COUNT TWENTY-FIVE

In the evening hours of November, 1972 at the Pelham Log Cabin Bar, 3289 Westchester Avenue, Bronx, New York. George Toutoian aided and abetted the delivery of 1/4 kilogram of heroin to Vincent D'Amico in exchange for $7000; actual delivery was made by Frank Stasi.

COUNT TWENTY-SIX

In the evening hours of January 10, 1973 in the Bronx. 1/4 kilogram of heroin was delivered to Al Casella who paid approximately $19,500.

COUNT TWENTY-SEVEN

In the evening hours of early to mid-May, 1973 at 1113 Vincent Avenue Bronx, New York. Three kilograms of heroin were cut and packaged at this time.

COUNT TWENTY-EIGHT

In the evening hours of mid-May, 1973 at the Pelham Log Cabin Bar, 3289 Westchester Avenue, Bronx, New York. Jack Spada transferred to Frank Stasi 1/2 kilogram of cocaine, and no money was exchanged. Inglese and Lentini aided and abetted this transfer.

COUNT TWENTY-NINE

In the evening hours of May 30, 1973 at the Pleasant Avenue Bar 117th Street and Pleasant Avenue, New York, New York. Lentini transferred 1/8 kilogram of cocaine to Dominick Lessa, and no money was exchanged.

COUNT THIRTY

Approximately 3:00 A.M. on October 4, 1973 at 150 West 225th Street, Apartment 2H, New York, New York.

4. Additional co-conspirators:

Leo Cemino
John Doe, a/k/a "Ernie Pontiac"
Paul Gregorio, a/k/a "Paulie the Arrow"
John Doe, a/k/a "Trinny"
Louis Lepore
John Doe, a/k/a "Mike"
Vincent Papa
Frank Stasi, a/k/a "Boo-Boo"
John Doe, a/k/a "Jimmy"
John Doe, a/k/a "Bati"
Sophie Inglese
John Doe, a/k/a "Burke"
Anthony Pagano
John Doe, a/k/a "Joe Sharp"
Frank Monaco
Frank Lalli, a/k/a "Joe Flats"
Alfred Lalli
Sal Landi
John Doe, a/k/a "Ray"
John Doe, a/k/a "Jimmy"
John Dingle
Primrose Cadman
Louis Oliveras
Jack Spada (R.I.P.)
John Doe, a/k/a "Ralph Birdie"
John Doe, a/k/a "Bubba"
Martin DeSaverio, a/k/a "Jinx"
Marion Starace

5. The names of the defendants and the approximate date of their entrance to the conspiracy:

rmine Tramunti - January 1973
Louis Inglese - June 1969
Joseph DelVecchio - June 1969
Donato Christiano - summer of 1970
Thomas Lentini - spring of 1971
Angelo Mamone - November 1970
Joseph DiNapoli - June 1971
Carmine Pugliese - February 1971
Frank Pugliese - March 1971
Pat DiLacio - July 1971
Joseph Ceriale - spring of 1971
John Gamba - September 1971
Anthony Loria - fall of 1970
Vincent D'Amico - fall of 1972
Dominick Lessa - fall of 1970
Benjamin Tolopka - summer of 1970
George Tautoian - fall of 1972
Frank Pellegrino - 1971
Joseph Marchese - spring of 1971
Richard Forbrick - summer of 1970
Frank Russo - spring of 1971
Warren Robinson - February 1972
Thomas Dawson - June 1971
Al Greene - May 1971
William Alonzo - November 1971
Hattie Ware - May 1971
John Springer - spring 1971

Mary Jane Salviani - spring 1973
Henry Salley - October 1972
Basil Hansen - May 1971
Estelle Hansen - June 1971

Yours, etc.,

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

By: _____
WALTER M. PHILLIPS, Jr.
Assistant United States Attorney
Office and Po Office Address:
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New York, New York 10007
Tel: (212) 264-6345

GOVERNMENT'S SUPPLEMENTAL BILL OF PARTICULARS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

-v- : GOVERNMENT'S SUPPLEMENTAL BILL OF PARTICULARS

CARMINE TRAMUNTI, et al., :

73 Cr. 1099

Defendants. :

S I R S :

The United States of America, as and for its Bill of Particulars heretofore provided, alleges as follows:

1. Additional co-conspirators:

John Dugan
Joseph Andretta
Harry Pannirello
John Pannirello
James Provitera
John Doe, a/k/a "Bubbles"
John Doe, a/k/a "Georgie"

2. Additional information as to overt acts 11, 12 and 14:

Overt Act 11- The heroin was received from Harry Pannirello.

Overt Act 12- The heroin was delivered by John Pannirello.

Overt Act 14- The heroin was to be purchased from Harry Pannirello.

tofore, what is your decision?

THE COURT: They are reserved. How can I decide something without reading the papers?

(Juror present.)

THE COURT: Mr. Engel, you challenged the juror for cause because of a conversation held between you and Mr. Siegel and myself in the robing room which was entirely off the record and unfortunately Mrs. McDonald walked in in the middle of it.

Anyone object to it?

Mrs. McDonald, you are excused. You walked in the middle of something that maybe you shouldn't have. It was certainly not your fault.

(Juror excused.)

THE COURT: Unfortunately the juror walked in while we were having a conversation about the last trial. Basically what was being referred to was the Tramunti trial and I don't want that trial to slop over into this one.

MR. SIEGEL: I hope not.

THE COURT: Do you recall? We're talking about your going up to the hospital?

MR. SIEGEL: Yes, your Honor.

THE COURT: Those spectators in the back will move over to the other side of the room.

Number 2, apropos, I would like him delivered to the court before that jury comes in or before at least they are seated. If the jury is brought in later, it's suspicious to a lot of them that he may be incarcerated.

MR. SIEGEL: Your Honor, if it please the Court, the situation which existed here at approximately 2 o'clock -- the respective jurors were sitting in the box and the remaining panel were sitting in the audience. Most of the defendants were here. At that time the marshals walked into the courtroom with those defendants who are incarcerated. I think that the possible prejudice to the prospective jurors in the panel may be devastating to my client.

I would ask your Honor in behalf of myself and other counsel in this case to move for a new panel because of the possible prejudice which this particular panel may have observed.

MR. FISHER: I should add in support of the respective motions, your Honor, and this may enlighten all parties, my intention is to open to the jury stating that Mr. Robinson has, in fact, been convicted for the conspiracy alleged in this case and that he does not deny, he does not deny narcotics trafficking with Mr. Dawson, Mr. March, Mr. Provitera, Mr. Pannirello and Miss Ellis.

UNITED STATES OF AMERICA

v. 75 CR. 1112

WARREN ROBINSON, et al.

New York, New York
January 30, 1976
10 A. M.

- - -

(In the robing room.)

MR. FISHER: Your Honor will recall that I think in the motion for a severance I told the Court quite frankly what the problem was as best as I could without confessing guilt to anything on the part of the defendant.

There is no way I can try this case in its present posture without, in my opinion, proofing or admitting to the jury that Robinson was a co-conspirator, and the very count charged here, that he dealt with the very people who were involved in this case. That is our position.

Our position will be, however, that the government will be unable to prove beyond a reasonable doubt the specific violations as charged in the substantive counts. That is the only way I can proceed, especially in view of the bifurcation.

Now, I represent to you, your Honor -- it is the guard's honest truth -- there was no orchestration of any

kind of severance applications from co-counsel. The only reason I mentioned it ahead of time was because I think I indicated on the record that other counsel were concerned about their clients coming in late and looking like they were incarcerated. I thought it appropriate them to point out that Robinson would be admitting that he's in jail.

I have spoken with other defendants counsel in this case and they are apoplectic, literatlly off the wall. I don't know what to do about that.

The government has a suggestion.

MR. ENGEL: First of all, your Honor, I think this concerns all counsel. I think we ought to have all counsel here.

THE COURT: Sure. Bring them in.

(Pause.)

THE COURT: Read it back.

(Record read.)

THE COURT: Go ahead.

MR. ENGEL: Your Honor, I would like to state the government's position on this problem.

THE COURT: Sure.

MR.ENGEL: It seems to me that there are two basic disputes involved in this case, both of which involve the same proof.

One dispute is between the government and Mr. Robinson, wherein the government alleges basically that he was the manager of much of the enterprise charged in the indictment, but there is no dispute as to him, and it's conceded, no dispute as to his participation in the conspiracy

The second dispute is with the other defendants in the case, and that dispute is whole and it involves their participation, if any, in a conspiracy charged, and deals with the proof of the existence of a conspiracy as to those defendants.

The only way to solve both these disputes in one case, it seems to me, is not to bifurcate, to sever the substantive counts as to Robinson and to try the 848 count as to Robinson with the rest of the case as to the other defendants.

The way I see that happening is that that would solve several interests.

One, it would serve the interests of the judicial economy of the court.

Two, it would solve the dispute between the government and Miss Barber as to her severance motion.

Three, it will allow Robinson not to be placed in the position of being tried on substantive counts and contesting guilt and then go to the jury, conceding guilt

on the substantive counts if convicted in order to testify as to the 848.

Lastly, I don't think that the other defendants will be prejudiced in the event that Robinson testifies in the case on his own behalf as to the 848 because he will be there for cross-examination by all counsel.

For all I know, your Honor, his testimony will be exculpatory.

Certainly I have no notion of what his testimony will be, and his testimony will be equally subject to cross-examination between the government and defense counsel.

That is the government's suggestion as to how to try this case, one case and not several.

MR. FISHER: I can represent to you that Robinson's testimony would not be exculpatory of the co-defendants nowhere near.

MR. SCHMUKLER: I could represent --

THE COURT: Go through it one at a time.

MR. GOLDBERGER: May I inquire of Mr. Engel how it involves my problem, your Honor?

MR. ENGEL: Because Robinson would take the stand and presumably it would be exculpatory of your client, assuming the truth of the affidavits submitted already.

MR. GOLDBERGER: What if Robinson doesn't take the

witness stand?

MR. ENGEL: Robinson will take the witness tand.

THE COURT: Would he?

MR. FISHER: On 848, yes.

MR. LEVNER: May I ask a question?

THE COURT: Sure. Let's do it one at a time.

MR. LEVNER: Have you made a decision with respect to the severance?

THE COURT: No.

MR. GOLDBERGER: I thought that's what we were talking about.

THE COURT: It's part of what we will be talking about. If I had a decision, I assure you I would come outside and tell you flat out.

MR. LEVNER: Okay.

THE COURT: Those of you who have been here before me know that.

MR. SCHMUKLER: Would your Honor be prepared to rule a matter of law that the defendant Robinson no longer has a fifth amendment privilege with respect to this conspiracy?

MR. ENGEL: I don't think that's an issue.

THE COURT: I don't think it is either.

MR. SCHMUKLER: Then perhaps --

THE COURT: He's been convicted.

MR. LEVNER: May I ask this, your Honor: With respect to the 14 defendants to be tried on the first part of the trial, will a jury reach a verdict with respect to those defendants and then have a separate trial with respect to Warren Robinson on the 848?

THE COURT: That is what we are talking about in the bifurcation.

MR. LEVNER: Let's consider this, Mr. Fisher. I have spoken with three attorneys. Should their clients be convicted by that opening statement or feel that they are being convicted by that opening statement, I think the government may very well have three additional witnesses on the 848 trial.

MR. SCHMUKLER: May I make this comment, your Honor?

It seems to me, with your Honor's planned bifurcation, you have all but granted the severance which could probably cure the entire problem here.

The only judicial economy that's actually being affected is the selection of another jury. Why not simply sever the defendant Robinson and simply expeditiously solve the entire problem?

THE COURT: I hear you. I thought about it.

MR. LEVNER: It might be a good idea.

THE COURT: Believe it or not --

MR. SCHMUKLER: It's become immensely more complicated since your Honor first ruled on that point.

THE COURT: I am aware of that.

MR. COHEN: May I say something?

THE COURT: Sure.

MR. COHEN: There is a particular problem with respect to my client, Tate.

THE COURT: Is there ever.

MR. COHEN: Yes. Mr. Fisher, in effect, is pleading his client guilty before the presence of the jury to the conspiracy count of which he has already been convicted.

My client is only charged in the conspiracy count. The government would proffer a statement which will indicate that my client had a relationship with Mr. Robinson beyond the time of the conspiracy.

The proffer of proof is an attempt to reflect in April of '75 what was done during the course of the conspiracy.

1-2 THE COURT: I read the memo.

MR. COHEN: Yes, sir. My point is, sir, that by pleading guilty, in effect, in the opening to the jury by

Mr. Fisher of Mr. Robinson, by not granting a severance, that will absolutely, in my opinion, your Honor, convict my client once that statement is offered in evidence against my client.

THE COURT: Which are we talking about?

MR. COHEN: I'm talking about Tate.

THE COURT: I know. Which are we talking about, the statement of Mr. Fisher's --

MR. COHEN: The statement in Mr. Fisher's opening coupled with the prospective offering of the statement by the government. Those two factors will inevitably lead to a conclusion by the jury. I think it's almost inescapable that my client is also guilty of the conspiracy, which is the only count he's charged in.

MR. MATEDERO: I think the same thing goes to my client, Arhelia Miller.

MR. WEISSFELD: It goes to everyone.

MR. MATEDERO: It goes allegedly into the interlocking admission, post-indictment admissions.

MR. GOLDBERGER: May I make a statement, your Honor?

THE COURT: Sure.

MR. GOLDBERGER: The problem is this in regard to the severance motion I have already filed on my client's behalf. If Mr. Fisher's client is severed from the case and

I should call him to the witness stand, he will still have a fifth amendment right if he is not in the case to take the fifth amendment at that point and I won't have the benefit of his testimony.

If the Court is inclined to grant Mr. Fisher's motion for a severance, I think that it has to grant Miss Barber's motion as well so that at a subsequent trial, after Mr. Fisher's client is tried, I can call him to the witness stand and he will have not a fifth amendment right at that point.

MR. FISHER: I think I should respond to these things.

T-2-1 MR. SIEGEL: Your Honor, this second count, Judge, if you are going to try this second count before this courtroom before this jury at this time, your Honor, if you ask us all, we are dead.

I represent Smith. If Mr. Fisher, my esteemed friend is going to make a statement that he says he is going to make, we are dead again.

I think your Honor is at the crossroads. You have a tough problem, there is no question. It is tougher than tough but I think you will have to use a knife to cut this case apart otherwise all that the government is buying is a verdict that cannot possibly stand because of prejudice. There is no way you are going to cut this up.

MR. ENGEL: Just briefly.

The government's position is as long as Robinson takes the stand he is subject to cross-examination and the defense is not prejudiced. In the event Mr. Fisher said in his opening statement that Robinson conspired with government witnesses, with co-conspirators in this case and with defendants -- I don't know that he will say that -- and with the defendants and I don't know that he will elicit proof on cross of the government's witnesses that his client conspired with the defendants, but my point is, the way to cure the problem is to have Robinson take the stand. He

will take the stand in defense of the 848.

MR. COHEN: In direct response to that, what Mr. Engel is suggesting is the same or equivalent analogously to a defendant pleading guilty before a jury which this Court would never permit and then remaining in the trial. That is the absolute exact example or hypothetical situation which Mr. Engel is proffering to the Court.

Mr. Fisher has, I think correctly, advised the Court and defense counsel that his client is in effect pleading guilty. How can that be done?

THE COURT: I think everything except the 848 count --

MR. ENGEL: We would sever the other counts so he would not be pleading guilty.

MR. FISHER: Do I get my chance to respond?

MR. CIAMPA: On the cross of the 848, as Mr. Engel says if we were to be allowed to cross-examine Mr. Robinson who's testifying as to his own defense on the 848 count, wouldn't the scope of the cross-examination be limited and if we went beyond that scope, wouldn't then the government in redirect be able to go into the conspiracy?

How does that remedy the situation?

MR. ENGEL: It is not my witness, it is Mr. Fisher's witness.

MR. CIAMPA: On co-counsel's cross-examination, on your redirect, you can go into what we have gone into on cross. How does that remedy the problem?

MR. SIFFERT: It is not redirect.

THE COURT: I think you guys go home at night and think of problems for me.

MR. SCHMUKLER: We are trying to think up a solution.

MR. SIFFERT: May I be heard?

THE COURT: Yes.

MR. SIFFERT: Mr. Goldberger mentioned that his client would be entitled to a third trial assuming the trial would proceed against 11 defendants, Robinson would be severed and his client would be tried on a third and that kind of circumstance suggests it is not proper for a severance

MR. COHEN: Your Honor, availability of Mr. Robinson for cross-examination purposes is not the point. It is the impact of his position at this particular trial, so the government's position that he will be available to be cross-examined is absolutely meaningless. That is basically the thrust of my position. The availability of Mr. Robinson does not cure the obvious prejudicial impact of his in effect pleading guilty to the one and only count that my client is involved in.

MR. GOLDBERGER: My position, your Honor, was that I need to have Robinson available for cross-examination purposes because Robinson on the basis of his affidavit which we understand is truthful, he would testify in effect that Ernestine Barber had no part of any conspiracy, she didn't cut any drugs, her apartment may have been used.

If he is not available to me, the only defense I have is taken away from me and that is why I have to have a severance.

MR. LEVNER: What guarantee do we have that he is going to testify? It is not binding.

THE COURT: I understand.

MR. FISHER: Starting first with the government's position, your Honor, I think the government's position is another attempt by the government to get the 848 tried together with the rest of the counts with respect to the rest of the defendants, an attempt which this court has twice explicitly refused already.

I fail to see in terms of the interest of the other defendants how such a procedure could possibly help any of them or obviate any of the problems that co-counsel suggest.

I think I am well enough known by co-counsel to know that I have no interest in helping the government convict anybody else. I have an overriding one, and that is, pre-

venting the government from convicting Mr. Robinson under a natural life count and it is because of that that I took the position I did before your Honor quite candidly stating why I couldn't testify, why Robinson couldn't testify on the substantive counts and would on the 848.

With regard to Mr. Levner's suggestion, that if I proceed along this cause, I will have three witnesses testifying against Mr. Robinson, so be it. That is the way the cookie crumbles.

Nevertheless, the suggestion has been made that Robinson be severed. I don't think the record yet reflects a request on my part for a severance in that form. I have requested a severance of either the substantive counts or the 848.

In the interests, your Honor, of trying to resolve what appears to be a very very complicated kettle of fish, I will, however, now move for a severance of the defendant Robinson from the entire case and that is our position.

THE COURT: Everybody has stated their position?

MRS. PIEL: I haven't said anything but my position is very similar to Mr. Cohen's except that my client has the conspiracy count and substantive count.

MR. LEVNER: I join with Mr. Cohen.

MR. WEISSFELD: I join.

THE COURT: You are all in.

MR. CIAMPA: How would the Court rule if Mr. Robinson testifies to the 848 count, could counsel proceed to cross-examine him as to the conspiracy then the government gets up to cross-examine Mr. Robinson, let's say as to his credibility and he gets into the matter of the conspiracy, how would the Court rule with respect to that line of questioning by the government?

THE COURT: I don't know.

MR. CIAMPA: I think that is crucial.

THE COURT: I don't know yet.

MR. FISHER: I should have stated one thing. If the government's position is accepted by the Court, needless to say, I am grateful for the severance of the substantive counts but the prospect of Robinson then being cross-examined by my colleagues at the defense bar is a horrible one. It is bad enough he would have to withstand the cross-examination of the government but then to submithim to the cross-examination of my co-counsel in this case would I think be a prejudice that is unwanted and unwarranted.

MR. SIEGEL: If he already stated he admits to the conspiracy --

THE COURT: Everybody has had their say?

MR. SCHWARTZ: A few short sentences.

Basically your Honor indicated he didn't want the Tramunti case to spill into this case and in view of the position taken by the government, I think it would be impossib for that to occur.

THE COURT: You gentlemen recognize we have at least one Sabbath observer involved in this case, me. We are going to have to pick at jury at some point. We will go as far as we can in picking a jury.

MRS. PIEL: What is our time schedule?

THE COURT: You guys will get off this afternoon.

MRS. PIEL: What time?

MR. CIAMPA: Don't worry about it.

2-2 Your Honor, you are only allowing 16 challanges, we have exhausted two. In the event that the Court keeps the case as it is, I am renewing my request for what I think is the most important voir dire question of the bunch and that is, whether or not a juror can give Robinson a fair trial on the remaining counts if he admits his culpability to narcotics dealing.

MRS. PIEL: Once again, if that question is asked --

THE COURT: The ballgame is over. Let's go back and pick a jury.

[200]

Tkl B1 p.m.

AFTERNOON SESSION

1:45 p.m.

(In open court - jury absent.)

THE COURT: What is the problem, if any?

MR. FISHER: If your Honor please, I have certain things I would like to put on the record and an application to make as well.

I would like to preface my remarks by stating to the Court, and I hope the record will reflect, that throughout the course of these proceedings I have endeavored to be as candid as a defense lawyer can possibly be with the Court, with opposing counsel, with my colleagues at the defense table.

In the course of that endeavor I have explained to the Court my problems as the defender of Mr.Robinson that I meet when I am forced to confront the joinder of the 848 count and Counts 4, 5, 9, 10 and 11, whic I think are the five substantive counts of this indictment; the problem being that Mr. Robinson can truthfully testify and exculpate himself with regard to the 848 without prejudicing my client by mak ng an open admission of guilt with regard to the substantive counts. Suffice it to say, I don't make that representation in terms of his testimony in the defense

of t.. ubstantive counts.

Accordingly, I move for a severance. The Court initially denied it, but I think the remarks of the Court earlier today indicated that the Court was now inclined to sever the 848. The problem, however, remains a serious one. I have an obligation, I think, to this Court and I have an obligation to my co-counsel.

I am not of the school that enjoys participating in the prejudice of defendants who are joined in this indictment or any other case. I am reluctant, indeed, to do anything which would hurt their chances of an acquittal in this case.

The fact remains that my obligation is to Mr. Robinson first.

As a result of those, I repeat to the Court what I have said before, that it is my intention, if Robinson goes to trial in the substantive counts, not to put him on as a witness and, in fact, I am prepared to offer an affidavit of his to that effect, that he will not testify at a trial in which the substantive counts are charged.

THE COURT: Mr. Robinson, you heard what your counsel said.

DEFENDANT ROBINSON: Yes, sir.

[202]

THE COURT: You agree with that?

DEFENDANT ROBINSON: Yes, sir.

THE COURT: I don't need an affidavit.

MR. FISHER: Thank you, your Honor. I have met with my colleagues. I have told them what I intend to do.

The opening statement will include not only my admission that Mr. Robinson has dealt in narcotics with each of the five co-conspirator witnesses, that we expect to testify for the government, but, as a matter of fact, with many, if not most, of the defendants here on trial.

Our position is, nevertheless, that the government will be unable to meet its burden with regard to the specific offenses alleged against Robinson in the five substantive counts.

I have spent this weekend or part of it, and my associates have been researching what little law there is with regard to this unique situation.

Your Honor, we are not talking about mere inconsistent defenses, we are not talking about a situation where Robinson gets on and testifies and inculpates one or more co-defendants and then the lawyers are allowed to cross-examine.

There are cases that hold that denial of the

severance is not reversible error. There are cases that hold that denial of a severance even under those circumstances is reversible error.

I invite the Court's attention, most respectfully, to United States against Johnson, 478 F2nd 1129, which reversed where defenses were toally inequitable and inconsistent.

I need only remind the Court of Mr. Levner's statement about if Mr. Robinson were to proceed to testify there would be three, and I think the number got up to seven, more witnesses in this case. I assume he was referring to co-defendants.

Beyond that, your Honor, Mr. Robinson won't testify. The situation is if I were one of my colleagues in this case, I would be literally going through the roof looking for a spatula to scrape me off the floor in order to defend against another lawyer getting up and opening and saying that my client is guilty because that, your Honor, I regret to say, is exactly what I am going to be saying.

There is only one case that I can find, your Honor. I have discussed this with the government and their efforts have produced nothing further on this issue, but I think United States against Gambrill, 449 F2nd 1148, is as close to on point as possible.

There the Court focused on the precise problem we have here, where a lawyer's statement, in that instance a statement by the Court, is uncross-examinable, whereas here the co-counsel, the lawyers for the co-defendants who are implicated implicated by my statement, by my cross-examination, by my summation, by everything I do in this case cannot get back, cannot meet those charges because they cannot cross-examine me.

In Gambrill we had a situation where there were only two defendants where Gambrill offered one of the defendants -- I don't remember his name -- offered two alibi witnesses. The alibi witnesses testified, and apparently co-counsel thought that their testimony was so inherently unbelievable that he wished to disassociate himself from that testimony.

What happened was he asked the Court to instruct the jury, as the judge properly could and should, that those witnesses were testifying for the defendant who offered those witnesses and the other lawyer had nothing to do with it.

The Court of Appeals found quite properly, I think, that the implication was that the other defendant and his lawyer didn't really think those alibi witnesses were all that terrific and disassociated himself from that.

Counsel for the offerer of those witnesses argued in the Court of Appeals that he could do nothing to rebut the inference that lay like poison in the courtroom from co-counsel. He couldn't cross-examine, he couldn't do anything. The Court of Appeals reversed on other grounds, but, nevertheless, almost gratuitously went on to discuss a severance point and indicated --

THE COURT: The Court of Appeals does things gratuitously all the time.

MR. FISHER: I'm not here to defend the Court of Appeals. I have had my disagreements with them as well, your Honor.

In any event, the Court wrote the central problem is that Gambrill did not take the stand and was not subject to cross-examination concerning either his whereabouts on the night of the crime or his reasons for refusing to subscribe to the alibi presented by Huttner's witnesses. That's 1161. That's the question here, your Honor.

As far as Robinson is concerned, he is grateful to the Court and thanks this Court for the severance of 848. That's all really that he is entitled to.

As an officer of the court I am compelled to tell you what I will be doing in this case, and further

as an officer of the court I advise your Honor of what I would submit to you, most respectfully, is a very substantial confrontation problem that would be raised by my actions in behalf of Robinson which would inure to the awful prejudice of all the other counsels' clients in this case.

The record will reflect that each of them have moved for a severance as soon as they were advised of the situation. The application, your Honor, is at this time for my request -- I renew it before exercising any further challenges to inquire of this prospective jury whether or not my admission of Mr. Robinson's culpability of a narcotics conspiracy will foreclose their fair and unbiased determination of the issues presented to it by the Court in its ultimate charge.

B2 I remind the Court as well, if I may, that in the interest of fairness to all, I have in Robinson's behalf moved for a severance if that will ease the burden I know these conflicting positions place upon the Court.

MR. SCHMUKLER: Mr. Fisher's position leaves the other defense attorneys with a prosecutor in their ranks, and I think that puts it in simplest terms.

THE COURT: Mr. Fisher, you have never been a prosecutor, have you?

MR. FISHER: No, your Honor. This will be my first attempt.

MR. ENGEL: I wish him the same success as he's had as a defense lawyer, your Honor.

The government's position on Gambrill, your Honor, is that to the extent that it discusses the severance question at all, it reaches it after having determined that the conviction in the case must be reversed because of a prejudicial identification by the rape victim of the two assailants.

To the extent that any discussion in there of severance is meaningful, it is dictum. Not only that, your Honor, it is from the DC Circuit and, of course, not from the Second Circuit.

The government's research in this matter stems first as to the situation that would obtain were Robinson to take the stand on the 848 count and, of course, that was the government's application because the representation of Mr. Fisher was, indeed, he would take the stand on 848.

Therefore, any prejudice due to confrontation would wash out if he took the stand in defense of that count.

He said now, and your Honor accepts his client's

joining that representation, that he will not take the stand as to the substantive counts. That leaves Mr. Fisher, your Honor, with an opening statement and a summation which his co-counsel cannot cross-examine.

I don't know what he is going to say in his opening statment or what he is going to say in his summation, but to the extent that any of --

THE COURT: Would you believe at this point he doesn't know either.

MR.FISHER: Wait a minute. That's not true at all. I know precisely what I'm going to say, your Honor. If you want, I will be happy to give it to you right now.

The substance of it is Mr. Robinson concedes the existence of the conspiracy, he concedes his participation in it and he concedes his relationship as a narcotics violator with the government's witnesses and with the defendants here on trial.

MR. ENGEL: Your Honor, to the extent that Mr. Fisher makes these remarks, I assume, for instance, that he does not say that Mr. Robinson conspired with Mr. Schmukler's client, for instance, hand-to-hand. In other words, your Honor, I think that there are at least two defendants in this case, Mr. Schwartz' client and Mr.Schmukler's client, who had nothing to do in a Washington

sense with Mr. Robinson, although there are links and otherwise to the conspiracy. In any event, I don't think that Mr. Fisher's remarks in opening statement or in summation are things which the jury should consider as evidentiary unless they are borne out by the evidence, and Mr. Fisher should be instructed by this Court that except insofar as he knows what he is going to prove through the government's witnesses and any defense witnesses he intends to call, that he not refer to any matters outside what he knows will be the record in this case.

The record in this case will, of course, establish we hope through the government's witnesses that these defendants all dealt in narcotics with Mr. Robinson, and to that extent Mr. Fisher is free to comment.

In any event, the Court will caution the jury that no remarks of counsel will be taken as evidence and that his argument would simply be inconsistent with the other defenses. That's all.

(Continued on next page.)

Tk2 B1 p.m.

MR. SCHMUKLER: Most respectfully, Mr. Engel's remarks constitute the hight of irony. We shall now look at the prosecutor to defend us against Mr. Fisher's prejudicial comments. It disregards the law. An attorney making formal judicial admissions on behalf of his client may be damaging to the other defendants on trial who have no opportunity to cross-examine Mr. Robinson or any opportunity to cross-examine Mr. Fisher.

THE COURT: Anybody else?

MR. SCHWARTZ: Of course, your Honor, on behalf of Al Green, I would also say that even if Mr. Engel indicates that Mr. Robinson is not going to produce any evidence that they were dealing with each other, the mere fact that evidence can be produced that Mr. Green was dealing with somebody else, we are dealing with a conspiracy matter, would certainly be prejudicial and I was just looking here at Wharton's Criminal Procedure and if I may quote one line, it says, "When one or several defendants are jointly indicted and made admissions or confessions, a severance should be ordered unless an attorney for the state expressly declares that such statements will not be offered in evidence at the trial or they are not in fact offered to the jury without appropriate instructions," and it cites a Court of Appeals case in the Eighth Circuit, Hale vs.

United States, 25 Fed.2nd 435.

THE COURT: You are all joining.

MR. GOLDBERGER: I have another problem.

It appears from the predicament I am in from the unique position of Miss Barber from the affidavit of Mr. Robinson and which we have already moved for a severance, it appears the only way Miss Barber will get a fair trial is if there is no bifurcation of the 848 count. When Mr. Fisher says Mr. Robinson will testify to exculpate himself from the 848, I would be able to cross-examine. If he is given a severance, which I believe quite probably your Honor may do, he will not be available as a witness as he will take the Fifth Amendment, should I call him.

He is in the case with just the substantive counts. He is also not going to testify and thereby rob me of the one witness I have involved in two overt acts with Miss Barber who could completely exonerate her.

MR. ENGEL: To that extent, Mr. Goldberger's motion is joined by the government in that we see absolutely no problem at all in trying Count 2 of this case with or without the substantive counts, but certainly without them. If there were to be the case, the contradiction problem would be a washout and we could go right to trial.

MR. COHEN: If I could briefly reiterate my

THE COURT: Would you believe there are reasons such as that that would inspire people to waive the jury? To suggest it is a manipulation of the system is offensive, not only to defense counsel but also to this Court.

I understand, Mr. Engel, you are not in a position to do anything else except to reiterate the policy of your office. I am not personally offended, but I would suggest that you go back and speak to Mr. Edwards and speak to Mr. Cahill and suggest that if they don't get up a better reason for the policy, maybe they ought to drop it.

It is nothing personal.

MR. ENGEL: I understand, and there was nothing obviously personal in the government's position.

THE COURT: God save us if I was offended by everything that happened in court.

Is there a marshal present?

Mr. Fisher, you renew your motion to severe Warren Robinson?

MR. FISHER: Yes.

THE COURT: Motion is granted.

Will the marshal take Mr. Robinson out.

Mr. Fisher, I will try Mr. Robinson's case immediately after I finish this one and I tell you we are going to try it.

and I request your Honor to instruct the Government, if you will, not to elicit any testimony from this witness as to the defendant's last name, since it is apparent from grand jury testimony that he gave that he never knew the last name of a person named Basil he claimed to have dealt with.

For him to testify as to the defendant's last name would be to permit him to give testimony before the jury which would incorporate knowledge which he gained at a time later than he may have made observations or committed the crimes in question that he is testifying about.

MR. ENGEL: I don't intend to elicit that. I don't know whether he knows it now.

(In open court)

MR. ENGEL: The Government calls Harry Pannirello.

H A R O L D P A N N I R E L L O, called as a witnss by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ENGEL:

Q How old are you, Mr. Pannirello?

A 33.

Q Where were you born?

A New York City.

Q Where did you grow up?

A New York City.

Q Where?

A East Harlem.

Q Did you attend school?

A Yes.

Q Where?

A Grammar school in East Harlem, junior high school, and two years of high school.

(Continued on next page)

Q Did you know him by another name?

A Yes.

Q What was that?

A Georgie.

Q After you received a phone call, what did you do?

A I met Mr. Pugliese on University Avenue in the Bronx.

Q How did you know where to go?

A He instructed me beforehand to meet him there.

Q In a phone call?

A No.

Q When did he do that?

A The night we were talking at the restaurant.

Q Did he describe it to you or did he take you there, he took me there.

Q When you got to that vicinity, what happened,, do you recall?

A Yes. I was sitting in my automobile and Mr. Pugliese pulled up in his automobile. I don't remember if I got out of my automobile and went into his or he got out of his automobile and went into mine.

We were sitting in the autmobile and I gave him two packages and he got out of the automobile and went into

a building.

Q What was the address of that building, if you know?

A 1380 University Avenue.

Q What is the cross street at that vicinity?

A 170th Street, I think.

Q What happened after Mr. Pugliese entered the building?

A He was in the building about 20 minutes, I would say, and come out of the building, went into my car and handed me some money and said, "I will be in touch with you."

Q How much money did he hand you, do you recall?

A About $200.

Q What did you do thereafter?

A I went home from there.

Q Some time after this, did you have occasion again to hear from Mr. Pugliese?

A Yes.

Q Do you remember when that was?

A I would say another two weeks after that.

Q How did you hear from him?

A He called me on the telephone.

Q What did he say, if you recall?

A He said, "I want you to meet me in the Bronx."

And I don't remember whether it was one or two packages he wanted me to bring, but he referred to it as shirts, one or two shirts with me.

Q Did he say where inthe Bronx to meet him?

A Yes, on University Avenue.

Q What happened after that?

A I met him on University AVenue and the two of us went into the same apartment building.

Q What happened when you entered the building?

A We went up to the 11th floor.

Q What happened on the 11th floor, if you can recall?

A We went to Hattie Ware's apartment.

MR. SCHMUKLER: Objection.

THE COURT: Overruled.

MR. SCHMUKLER: It is not apparent that the witness is speaking of personal knowledge. He hasn't testified that anybody told him where he was going .

THE COURT: I said overruled the first time.

Q What happened when you got to this apartment, Mr. Pannirello?

A Hattie Ware opened the door to the apartment, and me and Mr. Pugliese went into the apartment. When we got into the apartment, there was myself, Mr. Pugliese,

Hattie Ware, Basil and his girl friend Bunny.

Q Had you ever met any of those people before?

A Yes.

Q Before this occasion?

A I believe so.

Q You think you had met them before?

A I believe so.

Q Which one of them?

A Hattie Ware.

Q What happened when you got into the apartment?

A We were standing in the living-room and I had the paper bag in my jacket. I took it out of my jacket and laid it on a coffee table in the living room.

Q What was inthe paper bag?

A I don't recall if it was one or two packages of heroin.

Q What happened after you set it on the coffee table?

A Mr. Pugliese and Basil went into the bedroom of the apartment for a few minutes, and then they returned and we stayed at the apartment a few minutes longer, and left.

THE COURT: Does this complete this transaction?

MR. ENGEL: One further question.

Q Did you receive anything from Mr. Pugliese when you left?

A I don't recall if I did or I didn't.

MR. ENGEL: This is a convenient break, your Honor.

THE COURT: That is what I was looking for. Escort the jury from the room. Be back here at two o'clock.

(Jury leaves the courtroom.)

THE COURT: You may leave.

(Witness leaves the courtroom.)

THE COURT: All right, we all have enough to do over the lunch time break. I will get started with my work, you do the same.

(Luncheon recess.)

(In open court; jury absent.)

THE COURT: You asked for a ruling as to whether the witness Pannirello could mention jail. It is the only way it makes sense. Under the circumstances I am afraid we are going to have to let him mention it.

You also asked for a ruling as to whether certain exhibits offered yesterday could be received in evidence. They will be.

MR. SIFFERT: Mr. Clerk, that will not be 50. 50 was withdrawn.

xxx (Government Exhibits 39, 40, 41, 42, 41A, 43, 44, 45, 46, 47, 48, 49 and 51 were received in evidence.

THE COURT: Mr. Engel, can we continue without any identification right now?

MR. ENGEL: Your Honor, I did some checking at lunch. The Government represents that the witness Pannirello has not been shown any photographs of any sort subsequent to the trial in United States vs. Tramunti, that is of the defendants on trial.

Last night at my office he was shown a picture of a Bunny Hansen and Butch Pugliese and Hattie Ware, and perhaps one other photo.

In any event, not of the defendants on trial.

As to the situation which pertained prior to that trial and during it, he was obviously shown, as your Honor well knows, several photographs of the defendant Hansen at the trial and these were received in evidence.

In addition, prior to his going to court, in Mr. Phillips' office, he was shown pictures of Hansen, some of which were then received in evidence.

Your Honor declined to receive all of them.

Before that, prior to the grand jury testimony in October of 1973, the witness Pannirello was shown in the neighborhood of 50 photographs by Special AGents John Nolan and Fred Moore, the Drug Enforcement Administration. These photographs were all, with perhaps a few exceptions, including the exception as to Mr. Salley, photographs in the form of mugshots. Perhaps a few others were not mugshots but, in any event, they were of the same or similar size as mugshots.

From these the witness Pannirello identified the person he knew as Basil, the person he knew as Al Green, and the person he knew as Folks. That is the state of the recor

It is the Government's position that with respect

to each of the motions, each of the applications made before lunch, that they should be denied for two reasons.

First of all, they are untimely. They should have been made long ago. It has been a matter of record in this court that the witness Pannirello would testify since I think early January of this year, perhaps even earlier.

Secondly, they should be denied because there is no affidavit of any sort which would suggest that any identification of any of these defendants would be impermissibly suggestive on the part of the Government.

At no time has anything been brought before this trial which would suggest that the witness was given or shown any pictures in an impermissibly sugggestive manner, and the witness' testimony as to how many times and so forth he saw each of these people will be that to the effect that he saw them, in the case of Mr. Wesley, perhaps two to three times, the witness Dawson testified more than that.

In the case of Mr. Hansen and Mr. Green, substantially more times, at least a dozen, probably more.

I think that there is no showing at all that in any of these cases the identifications by Pannirello would be likely to be the result of an impermissibly suggestive

action on the part of the Government.

MR. SCHMUKLER: May I respond, your Honor?

THE COURT: Sure. That is what I was waiting for.

MR. SCHMUKLER: As your Honor will recall, at the beginning of the trial I had requested the grand jury testimony of Mr. Pannirello and certain other 3500 material as a prelude to making the necessary motions. It wasn't until last week. Your Honor will also recall the Government refused to make that disclosure, and last week I renewed the application.

Your Honor prevailed on the Government to make some disclosures that might enable me to bring on the necessary motion. I had anticipated at that point that the Pannirello testimony could all be effected by the outcome of a possible motion to suppress evidence seized on October 4 of '73.

Nonetheless, the Government did, pursuant to your Honor's direction or at least at your Honor's request, disclose to me the grand jury testimony last Friday, and I picked it up from Mr. Engel's office late that afternoon.

I don't know if your Honor will recall that exhibit from anything that may have taken place during the Tramunti trial, but the testimony before the grand jury

on October 2 of 1973 was just a bare statement that the witness Pannirello had delivered drugs to Hattie Ware, Al Green and a person known as Basil.

Thereafter, your Honor, the seizure at the 150 West 225th Street apartment took place when agents armed with a bench warrant naming a John Doe Basil, because there was no known last name at the time, in attempting to execute that warrant, went to an apartment.

The address of that apartment clearly was not known to the agents, clearly it wasn't known to the witness who testified before the grand jury and the probably cause issue relates solely to the question of whether or not the identification of the person named as Basil before the grand jury was at that time known to be Basil Hansen.

It would seem to me that if the person named as Basil before the grand jury was in fact, known to be BAsil Hansen, the defendant on trial, I would expect that the full name would have appeared before the grand jury, but the grand jury minutes reflect only the name Basil.

Mr. Engel now states that prior to that grand jury presentation a photo spread containing approximately 50 mugshots of roughly snapshot size was shown to the witness and an identification of Basil Hansen from photographs

was made at that time.

That is hardly consistent with the evidence set forth before the grand jury inasmuch as other persons identified during the grand jury proceedings were identified in full name and Mr. Hansen's only identification was by the name Basil.

So I feel rather confident that a fact issue exists, your Honor, as to whether or not the identification of the person named before the grand jury as Basil had been properly made at any time and was a factual predicate for the John Doe bench warrant issued when the indictment was returned.

I should add, your Honor, that I expect to have a memorandum of law on it for your Honor by tomorrow morning.

If not, I will certainly have some authorities by later this afternoon.

THE COURT: All right.

Mrs. Piel.

MRS. PIEL: With regard to the defendant Rufus Wesley, your Honor, I am rather surprised at Mr.Engel's remarks because all I knew about the connection of Harry Pannirello with Mr. Wesley was the material that was specified in a supplemental response to a request for bill of particulars in which I was told to read the testimony of

the Tramunti trial of Provitera, Pannirello and Barnaba.

Later I was told Barnaba had no connection. I did. Your Honor signed an order and I got the testimony.

In Mr. Pannirello's testimony he does not mention Mr.Wesley once.

So until today I did not know, I did not know in any way that he was going to identify Mr. Wesley.

When I was given the 3500 material today, I saw that a man by the name of Folks was mentioned, and just now for the first time I learned that photographs were shown.

It seems to me under those circumstances Mr. Engel did not expect me to come up with an affidavit, I had nothing to put in an affidavit.

I now request a hearing on the issue of the procedures used for theidentification. I don't believe that we can assume because we are told he was shown 50 mug-shuts, that everything was according to the way it should have been.

THE COURT: Mr. Engel.

MR. ENGEL: Your Honor, I don't understand, I guess, Mr. Schmukler's response.

It seems to me the issue here is whether or not Pannirello's identification of Mr. Hansen incourt is the product of an impermissibly suggestive, for instance,

the showing of photographs to the witness and saying that that is Basil.

That is the issue. I don't know what the issue about the grand jury is. I don't understand that.

The issue is only whether the witness is not testifying as to who Basil is from his memory or some other fashion, but as to whether that testimony was, in effect, put into his mind by the Government.

That is the issue that must be met, it seems to me.

MR. SCHMUKLER: If I can perhaps distill it a little bit more, your Honor, so it is clear for the Court and for Mr. Engel.

It is apparent, your Honor, that the seizure at the 225th Street apartment, part of the yields from the attempt to arrest Mr. Hansen at that location were certain photographs. It is now evident that the photographs seized there, the legality of which has yet to be demonstrated during the course of this proceeding, these photographs were shown to a witness who will now attempt to make an in-court identification. The 3500 material --

THE COURT: Shown to him what, two and a half years ago?

MR. SCHMUKLER: Yes. However, the witness'

testimony will reveal that the person he is going to attempt to identify in court was a person he had not seen for perhaps more than four years.

So that it may well be that the showing of the witness those photographs during the earlier trial in this case was itself an impermissibly suggestive re-enforcement of what may have been a bare residual recollection of a person who he claims to have dealt with.

The issue will still be before this jury whether this is the person he says he dealt with in 1971 or 1972.

As to that issue, your Honor, there is certainly an important right of the defendant to be litigated as to whether this witness has been shown, Number 1, the product of an illegal search and seizure, and, Number 2, even if that product were proper, that is not the result of an illegal search and seizure, whether it affects his in-court identification today in an impermissibly suggestive way.

THE COURT: Let me get this clear in my own head. Are you moving to suppress everything that was taken out of the apartment --

MR. SCHMUKLER: Yes, your Honor.

End 1A

[1886]

THE COURT: Mr. Schwartz.

MR. SCHWARTZ: I was going to move on behalf of Green also. I agree with Mr. Engel. He happens to be correct; that is the issue.

I don't see how the issue can be resolved unless we find out from the witness himself whether the identification was suggested to him. I don't think we can take it upon ourselves to assume what Mr. Engel says is necessarily so. It's the concept in his mind, in the witness' mind, not in Mr. Engel's mind.

MR. ENGEL: Your Honor, if I may, I would like to cite the Court to Simmons v. United States, which, of course, is the hornbook law on the subject. There the test is whether the identification or the spread of photographs or the means of identification of the defendant is so "impermissibly suggestive as to give rise to a very substantial likelihood of misidentification."

That's at Page 384 of Volume 390 of the United States Reports.

I don't think that there has been anything near that test shown here on these facts, your Honor.

MR. CIAMPA: May I be heard, your Honor, in this connection and also in connection with the motion I'm about to make to strike the testimony by Dawson and by

March identifying Mr. Taylor?

It is my understanding of a case that follows Simmons, Neil v. Biggers -- I will provide the citation at a later date if the Court will -- 409 U.S. 188, your Honor. The idea is that the Government has to inform defense counsel that it plans an in-court identification, that the in-court identification is, in fact, possibly based upon a confrontation that occurred after the original observation which the witness made.

The Court's job, your Honor, as I understand it, is then to determine whether that in-court identification is based upon the original observation or the more recent identification, whether it's a show-up, a line-up or photographs.

The Government in this case did not inform me that there would be a confrontation of photographs upon which an in-court identification would be based.

Therefore, your Honor, I made no motion to suppress.

It occurred to me at the time the witnesses were testifying that their in-court identification was based on photographs and, in fact, I may add it came out on my cross-examination, rather than on direct.

At that time, the reason I cross-examined, the

Court will recall, the witness Dawson identified with some difficulty the defendant Turner, I believe it was, at that time, and this precipitated in my cross the evidence that the witness Dawson -- and I asked on cross If March were both shown photographs of the defendants in this case.

If the Government does not bring out the fact that that in-court identification might possibly be based upon a suggestive confrontation, ex post facto, rather than upon an original confrontation and knowledge of defendants, no defense was in the position to make a motion to suppress that in-court identification.

There has been no Wade hearing and Mr. Engel is suggesting that it is now too late.

I state to this Court that there could have been no Wade hearing based upon what I, for one, knew as I started out, as I began my representation of the defendant Taylor in this trial.

Secondly, I want to add to what Mr. Schwartz said.

Mr. Engel is now representing to this Court that everything is all right, that the subsequent confrontation was not suggestive, that the exhibition of photographs was done in a proper manner.

I don't doubt Mr. Engel's word. However, the procedure is clearly defined in the United States Supreme Court: There is a certain test whereby the witness tells of his original observation, the Court determines the length of time between the original observation and the in-court testimony, the Court determines whether the original observation was accurate, what the duration of the original observation was, any obstructions in the original observation. That comes not from Government counsel but from a witness.

So I submit, your Honor, that what Mr. Engel is trying to do is show by clear and convincing evidence, the burden of which is on the Government, that the in-court testimony is based upon independent knowledge of the witness. What he is trying to do is offer that testimony himself.

And clearly, the rule of the Supreme Court and this Circuit is that that has to come from witnesses.

THE COURT: Go ahead.

MR. LEVNER: Very, very briefly, your Honor.

In November of 1975 I did submit such an affidavit to this Court with a motion for a Wade hearing with reference to Mr. Ramsey. That motion was decided by this Court, denied, and at this time -- at this point I would like to get some

representation from the Government in open court as to whether or not any of the three witnesses, namely, March, Dawson, or Ellis, were shown any photographs between the time they allegedly saw and spoke with my client and this in-court testimony.

MR. ENGEL: I don't know, Judge.

MR. CIAMPA: That's in the testimony, your Honor. That is in the minutes, that they were shown photographs between the time --

MR. LEVNER: He just cured the statement. He said there was no affidavit. There was an affidavit.

THE COURT: All right.

MR. BROWN: I think there is a somewhat separate question that arises in connection with the case of Henry Salley, and I think this has some bearing on the application which I made prior to the noon recess, which I anticipate your Honor will rule upon before Mr. Pannirello is sworn to testify.

THE COURT: He has already started. He has been sowrn and he started already.

MR. BROWN: I'm sorry; before he continues.

In any event, I think the application should be amended to include, I think, an instruction to Mr. Engel, and this is really not a Wade motion but it is a directive,

it seems to me, that ought properly be issued by the Court to Mr. Engel that he should not be inquiring of Mr. Pannirello to attempt an identification of Henry Salley.

The reason that he should not be permitted even to ask that question, it seems to me, in the case of Henry Salley -- we have law in this case, that law being from the Court of Appeals -- the Court of Appeals parenthetically remarked that the photographic identification procedure that was followed with respect to Henry Salley both by the witness Provitera and Pannirello was, indeed, impermissibly suggestive.

My recollection from the record is that you ruled in the case of Mr. Provitera that Mr. Provitera had had a sufficient opportunity, independently of that suggestive photographic showup, to make an in-court identification.

You did not rule that way with respect to the defendant Pannirello because he did not make an identification of the defendant Henry Salley. He was asked that question on the trial. He looked, I assume, at each of the defendants in the courtroom. Mr. Henry Salley was present in the courtroom. Mr. Pannirello looked around and testified under oath, after looking at Mr. Henry Salley, that Mr. Henry Salley was not present in court.

It seems to me that where that witness has

already testified under oath having had an opportunity to look at Mr. Salley, he's testified that Mr. Salley was not in the courtroom, when you have from the Court of Appeals that dicta that Salley was the victim of an impermissibly suggestive photographic identification procedure, then it seems to me that we are doing something that is pretty, pretty unfair, and pretty, pretty risky, leaving it to Mr. Pannirello perhaps to take a wild guess, a wild hunch, and point the finger today, nearly two years later.

It seems to me if he did, by mischance or otherwise, identify Henry Salley at this trial, a timely motion to strike that testimony would be granted for the reason, for the reason that you would not be able to hold that his in-court identification was untainted by what has happened in this case up until now with respect to the defendant Salley.

I don't apprehend that some miracle has occurred and Mr. Pannirello is going to be able to make that identification. I don't believe that he will.

I really don't think that he should even be given that opportunity, because then a timely motion to strike, even though granted, will not cure the prejudice that will result in terms of the jury having heard testimony

that, of course, has to be stricken. I don't think that Mr. Engel should be permitted to give him another try at nailing Mr. Salley.

THE COURT: A strange choice of words.

MR. SCHWARTZ: Your Honor, aside from what I said, I wonder if the Government would be willing to indicate now that Mr. Pannirello has not pointed out the names of various individuals and where they are sitting in the courtroom for the purposes of identification.

MR. ENGEL: As a result of the motions, I asked the witness at lunch in my office whether -- I said:

"Answer the following questions yes or no."

I asked him whether he saw the defendants, and the witness answered.

I said, "Do you see where they were sitting?"

He told me. He answered that question.

That's all I asked. That's all I asked him. That's all he told me.

I wanted to know whether in-court identifications would be made; that's all. I didn't indicate in any fashion --

(Continued on next page)

MS. PIEL: Point of information --

MR. ENGEL: Excuse me, Ms.Piel.

THE COURT: Sit down, Ms. Piel.

MR. ENGEL: I didn't indicate in any fashion where anybody was sitting.

I said, "Did you see Hansen or Basil in the courtroom, Al Green in the courtroom, and Folks in the courtroom?"

And he answered, "No."

I asked, "Did you see where he was sitting?"

And he said, "No."

MR. SCHWARTZ: In addition to indicating by Mr. Engel and Mr. Siffert, I would like to know if the witness was pointed out -- whether any agent pointed out to him where any defendant was sitting?

MR. ENGEL: I didn't hear you.

MR. SCHWARTZ: I would like to know whether any Government agent, DEA agent, pointed out where any of the defendants were sitting.

MR. ENGEL: No agent was in here, so I think that would be impossible, and I represent to the Court that no agent did.

THE COURT: Go ahead, Ms.Piel.

MS. PIEL: My only point of information, and

I think perhaps you answered it, was that he did identify the defendants that you have named --

MR. ENGEL: What I said and I want to make it perfectly clear, I asked him, "Did you see these three people in the courtroom, yes or no?", and he answered, "No."

"Did you see where they were sitting; yes or no?"

And he answered, "No."

That is what I asked him.

MS. PIEL: Did you make any further inquiry to find out --

MR. ENGEL: Absolutely none after that.

MR. CIAMPA: Your Honor, may I be heard?

THE COURT: Sure.

MR. CIAMPA: In connection with my motion to strike the in-court identification as being improper, the point I was talking about appears at Page 673 of the minutes, "Did you say you had seen pictures of most of the defendant, will be my question."

The witness Dawson's answer is "Yes, sir."

Your Honor, I am going to submit that is the first time I learned that there was going to be --

THE COURT: What is the date on that, Mr. Ciampa?

MR. CIAMPA: The date on what.

THE COURT: The date of the portion of the

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UNITED STATES OF AMERICA

v. 75 Cr. 1112

AL TAYLOR, et al.

March 24, 1976
10:30 a.m.

(Trial resumed)

(In open court; jury not present)

THE COURT: Various motions to dismiss or for acquittal were made. I have gone through them all, and the Government, to my mind at least, has made sufficient case to go to the jury. All those motions are denied.

Mr.Taylor made a motion to strike Overt Act No. 1. It is granted.

Mr. Hansen's motion to strike No. 37 is limited substantially to the charge, and I am not even sure whether I will refer to it when I read the indictment to the jury.

Henry Salley's motion to strike Overt Act No. 32, that portion which refers to the delivery of heroin, can be considered to be stricken.

Al Green, requests to charge for Mr. Green, Request No. 1 is denied. Requests Nos. 2 and 3 will be given in my language.

REQUEST TO CHARGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

- against -

AL GREEN,

Defendant.

REQUEST TO CHARGE

73 Cr. 231

----------x

That the only direct testimony in this trial against the defendant, AL GREEN, accusing him of the purchase of drugs was given by Harry Panirello and James (Jimmy) Provitera, although James Provitera failed to identify AL GREEN in open court.

That both Harry Panirello and James Provitera are considered to be accomplices in the alleged conspiracy. That I charge you that you must carefully scrutinize accomplice testimony and consider it with caution.

If after careful consideration you find the defendant, AL GREEN, was not proven guilty beyond a reasonable doubt by the Government through the testimony of either or both Harry Panirello and James (Jimmy) Provitera, after applying the rules of the presumption of innocence as presented to you by the Court, I charge you that you must acquit the defendant, AL GREEN, on all counts of the indictment.

Yours, etc.

HAROLD SCHWARTZ
Attorney for Defendant AL GREEN
Office & P.O. Address
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Brooklyn, New York 11241
(212) 596-7374

2 Copies Received

Date 9/3/76

Firm Hon. Robert B. Fiske Jr.

By M Kowalski

Crim Clks Off.

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